

**THE EFFECT OF PUBLIC POLICY ON THE ENFORCEMENT OF  
FOREIGN ARBITRAL AWARDS**

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## **Abstract**

This thesis is an attempt to trace the legal implications of the application and interpretation of the doctrine of public policy as a ground for refusing to enforce arbitral awards in international commercial arbitration. This requires an analysis of the extent to which public policy can be a proper defence against the enforcement of foreign awards. In this respect, Article V (2)(b) of the New York Convention is particularly important. The distinction which is being examined throughout this thesis is that between applying domestic or international public policy rules as grounds for refusing to enforce a foreign arbitral award.

This thesis is divided into seven chapters. Chapter One provides a general overview of the subject, and a background study of the source and nature of arbitral awards. This includes highlighting the differences between national and foreign arbitral awards and the means available for executing them, or resisting their enforcement. Chapter Two examines the nature and characteristics of the notion of public policy. It also deals with the role of public policy in private international law as a ground for excluding the normally applicable law or for refusing to recognise or enforce an otherwise enforceable foreign judgement and arbitral awards. The main object of this Chapter is to illustrate the influence of public policy rules on the functioning of conflict of laws rules. Chapter Three examines the proper procedural and substantive law that should be applied in international commercial arbitration, and deals with the duty of arbitrators to determine the applicable public policy rules as part of their duty to provide the parties with an enforceable arbitral award. It is argued that when conflict between domestic and international public policy rules occurs during the arbitration proceedings, arbitrators must comply with the international public policy rules as the most proper rules to govern in international commercial arbitration. Chapter Four examines in detail the supervisory powers of the courts in the country of origin over international arbitral awards and the applicable public policy rules. The effect of setting aside an international arbitral award for considerations of public policy in the country of origin, on enforcement in other countries pursuant to Article V (1)(e) of the New York Convention will be examined. Chapters Five and Six seek to analyse key cases that have arisen before the courts in regard to the application of public policy as a ground to refuse enforcement of foreign arbitral awards. A number of aspects will be examined which mainly relate to procedural public policy rules and issues concerning the subject matter of the dispute. Evidence will be found to support the argument that the notion of 'international public policy' is becoming increasingly recognised by courts as a basis for interpreting Article V (2)(b) of the New York Convention.



## **Declaration**

I declare that the thesis has been composed by me, and that the work is my own.

Hussam Talhuni

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# The Effect of Public Policy on the Enforcement of Foreign Arbitral Awards

## Table of Contents

<i>Abstract</i> .....	i
<i>Declaration</i> .....	ii
<i>Acknowledgement</i> .....	iii
<i>Abbreviations</i> .....	viii
<i>Table of Court Cases</i> .....	x
 <b>Introduction</b> .....	 1
 <b>Chapter One</b>	
Arbitration and Arbitral Awards .....	7
 I. Definition of arbitration and arbitral awards .....	 8
A. Definition of arbitral awards .....	11
B. The legal nature of arbitral awards .....	14
 II. International Commercial Arbitration and International Arbitral Awards .....	 18
A. Domestic arbitral awards and international arbitral awards .....	23
B. Foreign arbitral awards .....	24
1. The geographical criterion .....	25
2. The applicable law criterion .....	27
 III. Executing Arbitral Awards .....	 29
A. Voluntary execution .....	30
B. Resisting the enforcement of an arbitral award in the country of origin.....	32
1. Appeal from arbitral awards .....	33
2. Challenging the arbitral award to set it aside .....	37
 IV. Executing and Resisting the Enforcement of a Foreign Arbitral Award .....	 40
A. Recognition and enforcement of arbitral awards .....	41

B. The applicable rules to the recognition and enforcement of foreign arbitral Awards ..	43
1. The New York Convention of 1958 .....	46
2. Grounds for refusing recognition and enforcement .....	49
a. Article V (1) .....	50
b. Article V (2) .....	54
i. The relationship between arbitrability and public policy .....	54
ii. Article V (2)(b), public policy .....	56

## Chapter Two

The Notion of Public Policy and its Role in International Commercial Arbitration .....	59
I. The Notion of Public Policy .....	60
A. Definition of Public Policy .....	62
B. Mandatory rules and public policy .....	66
C. Public policy is a relative concept .....	69
II. The Conflict of Public Policy Rules .....	71
A. International and domestic public policy .....	73
B. The role of domestic public policy in private international law .....	73
III. The Development of International Public Policy Rules .....	81
A. Public policy in international conventions .....	86
B. Statutory and judicial trends towards international public policy .....	90

## Chapter Three

Deciding on Public Policy Rules by the Arbitral Tribunal .....	101
I. Applicable Rules in International Commercial Arbitration .....	104
A. Parties choice of procedural rules .....	106
B. Deciding the applicable procedural rules .....	109
C. Parties choice of substantive rules .....	116
D. Deciding the applicable substantive rules by the arbitral tribunal .....	119
1. Searching for the tacit choice .....	120
2. Deciding the proper rules to govern the substance of the dispute .....	123

II.	The Duty to Respect the Applicable Rules .....	128
A.	Mutual obligations imposed by the arbitration agreement .....	129
1.	Duties of the parties .....	130
2.	Duties of the arbitral tribunal .....	131
B.	The duty of respecting public policy rules .....	133
C.	The applicable public policy rules .....	136
1.	Public policy rules of the law chosen by the parties .....	136
2.	Searching for the proper public policy rules .....	139
D.	Applying the international public policy rules .....	147

## Chapter Four

	Public Policy as a Ground to Set Aside International Arbitral Awards Before the Court of Origin .....	151
I.	Finality of the Award and Courts Control .....	152
A.	The conflict between finality of the award and courts control .....	153
B.	Courts control over arbitral awards .....	159
II.	The Extent of Public Policy as a Ground to Attack the Award .....	161
A.	The applicable public policy rules to domestic arbitral awards .....	162
B.	The applicable public policy rules to international arbitral awards .....	163
III.	The Consequences of Setting an Arbitral Award Aside in the Country of Origin .....	170
A.	The concept of binding arbitral award under article V (1)(e) .....	171
B.	Enforcing nullified arbitral awards .....	174

## Chapter Five

	Public Policy as a Ground to Refuse Enforcement of Foreign Arbitral Awards .....	184
I.	Procedural Public Policy Issues .....	186
A.	Equity and Fair Opportunity to Present the Case .....	187
B.	Considerations of due process and the parties' right to present their case .....	195

II.	Lack of Reasons in the Award .....	203
III.	Lack of Impartiality .....	211
	A. Impartiality and independence of arbitrators .....	214
	B. Other Procedural Requirements in the Arbitral Tribunal .....	223
	1. Uneven number of arbitrators .....	224
	2. All arbitrators should participate in the deliberations .....	227
	3. The requirement of nominating the arbitrators in the arbitration Agreement .....	232
IV.	Concluding Remarks .....	235
 <b>Chapter Six</b>		
	Public Policy in relation to the Subject Matter of the Dispute .....	239
I.	Issues of morality .....	240
	A. Generally .....	240
	B. Corruption and purchase of influence in international trade .....	242
II.	Political Issues .....	250
III.	Economic Issues .....	257
	A. Generally .....	257
	B. Intellectual property rights .....	262
	C. Trade Restrictions .....	268
 <b>Chapter Seven</b>		
	Summary and Conclusion .....	278
 <b>Annexes</b> .....		
	Annex A The New York Convention .....	288
	Annex B The Egyptian Law No. 27 of 1994 .....	293
	Annex C The Egyptian Law No. 9 of the year 1997 Amending Certain Provisions of Arbitration Law in Civil and Commercial Matters as Promulgated by Law No. 27 of the Year 1994.....	304
	<b>Bibliography</b> .....	305

## Abbreviations

AAA .....	American Arbitration Association
ABA .....	American Bar Association
ADR .....	Alternative Dispute Resolution
ADRLJ .....	Alternative Dispute Resolution Law Journal
AJIL .....	American Journal of International Law
All ER .....	All England Law Reports
ALR.....	Australian Law Reports
AM. Bus. L. J. ....	American Business Law Journal
AM. J. Comp. L. ....	American Journal of Comparative Law
Am. Rev. Int'l Arb. ....	American Review of international Arbitration
Arb.Int .....	Arbitration International
Arb.J. ....	Arbitration Journal
Brooklyn J.Int.L. ....	Brooklyn Journal of International Law
BYIL .....	British Yearbook of International Law
Can.Bar.Rev. ....	Canadian Bar Review
Ch. D .....	Chancery Division
CJQ .....	Civil Justice Quarterly
CLJ .....	Cambridge Law Journal
CLOUT .....	Case Law on UNCITRAL Texts
CMLR .....	Common Market Law Review
Code of Ethics .....	Code of Ethics 1977 for Arbitrators in Commercial Disputes, prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association AAA and a special committee of the American Bar Association ABA; (1985) X Yearbook Commercial Arbitration, p. 239.
Colum.J.Trans.L. ....	Columbia Journal of Transnational Law
Const.L.J. ....	Construction Law Journal
Cornell L.Q. ....	Cornell Law Quarterly
CRCICA .....	The Cairo Regional Centre for International Commercial Arbitration
Croat. Arbit. Yearb. ....	Croatian Arbitration Yearbook
Harv.Int.L.J. ....	Harvard International Law Journal
Harv.L.Rev .....	Harvard Law Review
IBA Rules .....	International Bar Association Rules
IBL .....	International Business Lawyer
ICC .....	International Chamber of Commerce
ICCA .....	International Council for Commercial Arbitration
ICSID Rev.-FILJ .....	ICSID Review-Foreign Investment Law Journal
ILA report .....	International Law Association report "Final report on Public Policy as a Bar to Enforcement of Arbitral awards," London Conference (2000)
ILM .....	International Legal Materials
ILR .....	International Law Review

Int. Handbook on Comm. Arb .....	International Handbook on Commercial Arbitration
Int.Law. ....	International Lawyer
Int’L & Comp. L. Q. ....	International and Comparative Law Quarterly
Iran-US CTR .....	Iran-United States Claims Tribunal Report
J. INTL. L. BUS. ....	Journal of International Law & Business
J.Int.Arb. ....	Journal of International Arbitration
JBL .....	Journal of Business Law
JCI Arb. ....	Journal of Chartered Institute of Arbitrators
JMLC .....	Journal of Maritime Law and Commerce
JWT .....	Journal of World Trade
Law&Pol’yInt.Bus. ....	Law and Policy in International Business
LCIA .....	London Court of International Arbitration
LMCLQ .....	Lloyd’s Maritime and Commercial Law Quarterly
LQR .....	Law Quarterly Review
MAL Quarterly .....	Model Arbitration Law Quarterly
Mich.J.Int.L. ....	Michigan Journal of International Law
MLR .....	Modern law Review
N Y LI J Int’l L & Pol .....	New York University Journal of International Law and Policy
N.Y.L.J. ....	New York Law Journal
Netherlands Int’l L.R. ....	Netherlands International Law Review
NYIL .....	Netherlands Yearbook of International Law
Ohio ST. J. Disp. Res. ....	Ohio State Journal on Dispute Resolution
Stan. L. Rev. ....	Stanford Law Review
Tex. Int’l L.J. ....	Texas International Law Journal.
TUL.L.REV. ....	Tulane Law Review
UNCITRAL Model Law .....	United Nations Commission on International Trade Law
Y.B. COM. ARB .....	Yearbook Commercial Arbitration



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## INTRODUCTION

Arbitration has become a reality at the heart of international commercial relations. As every modern society seeks to meet the needs of the international market and to integrate fully into the international commercial community, arbitration has become increasingly important. This has been recognised in several legal systems, and therefore legal rules that regulate arbitration are now part of every modern legal system; international arbitral tribunals are instituted in every region around the world; and international conventions are organising and harmonising the arbitration rules between states.

The importance and increasing popularity of arbitration in international business, in preference to litigation, stems from its many advantages. In arbitration, parties hope to use arbitrators who have some technical knowledge of the subject matter of the dispute, which may not be expected in the case of ordinary judges.<sup>1</sup> They expect to settle their dispute in a manner more suited to commercial matters: they appreciate the fact that in arbitration there will be less solemnity and less bureaucracy, the procedures will be less rigid and less expensive, there will be less publicity and the discussion will take place in a more peaceful climate.<sup>2</sup>

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<sup>1</sup> Some times arbitrators are chosen on account of their technical knowledge, e.g. to give a final decision on the question of whether the goods which have been delivered are of the quality specified in the contract or to which extent the contract price ought to be reduced. For more information, see Rene David, *Arbitration in International Trade*, Kluwer Law and Taxation, (1985), p. 12.

<sup>2</sup> See, Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 2<sup>nd</sup> ed., London: Sweet & Maxwell (1991), pp. 53-57; Rene David, *op cit.*, pp. 10-12; Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration*, Library of Congress Catalog, (1994), p. 6-9; Wolfgang Peter, *Arbitration and Renegotiations of International Investment Agreements*, Martinus Nijhoff Publishers (1986), p. 94.

Nevertheless, despite its attractions, the ultimate measure of success in an international commercial arbitration case will depend on the enforceability of the resulting arbitral award, otherwise all of the arbitration process will be no more than a waste of time and money. Therefore, efforts have been made to guarantee international respect for the enforcement of foreign arbitral awards, by means of international conventions and domestic arbitration laws. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter the New York Convention)<sup>3</sup> is the most important international treaty relating to international commercial arbitration. It paved the way for the recognition and enforcement of foreign arbitral awards, as opposed to enforcing a foreign court judgement, thus establishing one of the greatest advantages of international commercial arbitration over conventional court settlement. Moreover, the New York Convention has led to a substantial degree of uniformity between the different enforcement proceedings of various legal systems. The unifying effect of the New York Convention has turned enforcement proceedings into a more or less mechanical approval process which has little in common with adversarial court proceedings.

However, an arbitral award cannot be expected to be recognised and enforced without being subject to some control by the competent authority in the country in which enforcement is sought. This could be established upon various grounds, the violation of which may lead to the refusal to enforce a foreign arbitral award. Such grounds are not the same in every legal system, therefore the New York Convention has introduced a list of internationally recognised grounds, and imposes on its parties an obligation to limit the grounds upon which an arbitral award can be refused to those set out in Article V paragraphs (1) and (2). One of

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<sup>3</sup> United Nations Treaty Series (1959) Vol. 330, p. 38, No. 4739. See Annex A, p 288. The New York Convention was prepared and opened for signature on 10 June 1958, the United Nations Conference on International Commercial Arbitration, convened in accordance with Resolution 604 of the Economic and Social Council of the United Nations, adopted on 3 May 1956. It entered into force on 7<sup>th</sup> of June 1959, in accordance with Article 12 of the Convention.

these grounds provides that enforcement of the award may be refused if such enforcement “would be contrary to the public policy of the country in which enforcement is sought.”<sup>4</sup>

Unfortunately, public policy is an ambiguous notion that could be interpreted in various ways. This may leave the door widely open for national courts to exercise ultimate control over foreign arbitral awards, which may expose a foreign arbitral award to additional grounds, contrary to what had been intended by the drafters of the New York Convention. Moreover, the rules that could be considered to be of a public policy nature vary from state to state. Thus, what could be considered to be a valid action under one legal system, could be contrary to public policy under another. Accordingly, an arbitral award that was correctly made under a particular national law, may not be recognised and enforced, because it violates the national public policy rules of the state in which enforcement is sought. This may lead to uncertainty and confusion, since it will be difficult to secure the enforceability of foreign arbitral awards under the New York Convention, the consequence of which may undermine the effectiveness of international commercial arbitration.

This work discusses the role of public policy in the domain of international commercial arbitration and identifies the problems that may arise from applying the public policy ground. In dealing with these problems, relevant suggestions and proposals will be presented in light of recent developments. In the process, a distinction will be drawn between domestic arbitration and international arbitration. Emanating from this will be an exploration of the existence of international public policy rules that are more suitable to govern international commercial disputes - an approach that has already become a trend in cases decided under the New York Convention.<sup>5</sup> In this regard, relevant arbitration rules and court decisions of

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<sup>4</sup> Article V (2)(b) of The New York Convention.

<sup>5</sup> See the International Law Association *Report*, “Final report on Public Policy as a Bar to Enforcement of Arbitral awards,” London Conference (2000), p. 18. (Hereinafter “the *ILA Report*”).

various legal systems will be discussed in order to determine the extent to which courts are prepared to apply a narrow interpretation of the public policy ground. This will include examining decisions where enforcement has been refused, and also decisions in which applications based on public policy have been rejected. However, since it would be difficult to examine all national arbitration rules of the various legal systems, the research will focus on the situation in two countries (England<sup>6</sup> and Egypt<sup>7</sup>). The reason for choosing these countries is that one of them is a Common Law country (England); and the other is a Civil Law country (Egypt), although Egypt's civil law system at the same time, has its roots in Islamic law. In addition, the Egyptian legal system may be considered to be the leading legal system by most of the Arab countries.

This study is divided into seven chapters. Chapter One examines the source of a foreign arbitral award.<sup>8</sup> This chapter aims to give a general background of international commercial arbitration and the enforcement of foreign arbitral awards. It is therefore necessary to begin by defining 'arbitration' and 'arbitral awards', then to place this subject in the framework of international commercial arbitration. A distinction will further be drawn between national and international arbitration and arbitral awards. The execution and resisting to enforce national and foreign arbitral awards will also be considered in relation to the relevant provisions of the New York Convention, particularly Article V (2)(b).

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<sup>6</sup> The English Arbitration Act of 1996, came into force on 31 January 1997. See web site address: (<http://www.hmso.gov.uk/acts/acts1996/1996023.htm> ).

<sup>7</sup> The Egyptian Law No 27 of 1994, published in the Egyptian Official Gazette No. 16, 21 April 1994 and became effective on the 22<sup>nd</sup> of May 1994. *Intl. Handbook on Comm. Arb. Suppl.* 19. August 1995, Egypt, Annex B, p. 14. See ahead Annex B, p. 293.

<sup>8</sup> See, Chapter One, p. 7.

Chapter Two examines the notion of public policy.<sup>9</sup> Several important topics will be discussed in this chapter: what constitutes a public policy rule; how can a court distinguish between public policy rules and mandatory rules; the role of public policy in private international law and international commercial arbitration; and finally a distinction will be drawn between national and international public policy. The latter distinction will be put in perspective throughout the following chapters.

Chapter Three deals with the question of whether or not arbitrators are required to consider the application of public policy and how an arbitrator can determine the applicable public policy rules in the domain of international commercial arbitration.<sup>10</sup> The importance of examining this subject refers to the duty of an arbitrator to provide the parties with an enforceable arbitral award.

Chapter Four concerns the degree of control that can be exercised by the courts in the country of origin over international arbitral awards, and the role of the public policy ground in extending such control.<sup>11</sup> The importance of examining this subject relates to the fact that setting aside an international arbitral award for considerations of public policy in the country of origin is a ground that may lead to a refusal to enforce foreign arbitral awards, under Article V (1)(e) of the New York Convention.

The effect of public policy on the enforcement of foreign arbitral awards under Article V (2)(b) of the New York Convention will be examined in Chapters Five and Six.

Chapter Five is confined to examination of whether or not the public policy ground could lead to the refusal of enforcement of foreign arbitral awards if the award was based upon procedures that violate public policy of the country in which enforcement is sought.<sup>12</sup> A

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<sup>9</sup> See, Chapter Two, p. 59.

<sup>10</sup> See, Chapter Three, p. 101.

<sup>11</sup> See, Chapter Four, p. 151.

<sup>12</sup> See, Chapter Five, p. 184.

number of examples and judicial decisions that have been considered as constituting a violation of procedural public policy will be reviewed. This includes examining whether the right of the parties to be treated equally is a public policy issue, whether the absence of reasons in the award can be a valid ground to refuse the enforcement, and finally whether the lack of impartiality of an arbitrator could be raised under Article V (2)(b) of the New York Convention.

Chapter Six is devoted to analysing particular examples which concern public policy as a ground to refuse the enforcement of foreign arbitral awards for reasons that concern the subject matter of the dispute.<sup>13</sup> This includes morality issues, political issues and economic issues. A summary and conclusion will be provided at the end of this work in Chapter Seven.<sup>14</sup>

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<sup>13</sup> See, Chapter Six, p. 239.

<sup>14</sup> See, Chapter Seven, p. 278.

## **CHAPTER ONE**

### **ARBITRATION AND ARBITRAL AWARDS**



## **Chapter One**

### **Arbitration and Arbitral Awards**

In order to discuss the role of public policy as a ground for refusing to enforce foreign arbitral awards, it is necessary first to consider the process of international commercial arbitration and the nature of the resulting arbitral award. This study will start by examining the nature of the arbitral award and identifying the main characteristics of the so-called 'foreign arbitral awards'. Therefore, it is important to search for a comprehensive definition of arbitration, as this would help to discern the bases on which a resulting award is founded. Then, in examining what constitutes an enforceable foreign arbitral award, various questions will be posed: First, from where does the resulting award acquire its compulsory power? Second, on what basis can we determine whether arbitration is domestic or international in nature, and whether or not we can use the same basis to determine the character of foreign arbitral awards? What are the reasons behind enforcing the award voluntarily and on what grounds may the losing party resist the enforcement of an award in the country of origin? Finally, what are the core grounds and rules that govern the execution and enforcement of foreign arbitral awards. At the heart of this discussion lies the New York Convention as the most important convention governing the enforcement of foreign arbitral awards. In discussing the New York Convention the grounds on which recognition and enforcement of an award can be refused will be highlighted.

## I. Definition of arbitration and arbitral awards

Finding a comprehensive definition for arbitration is problematic. In this regard

Rene David said that:

“It is impossible to devise a definition for arbitration by taking into account the different national laws, it will be in some ways too broad and in other way too narrow.”<sup>1</sup>

Then he defines arbitration thus:

“Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons the arbitrator or arbitrators who derive their powers from a private agreement, not from the authority of a state, and who are to proceed and decide the case on the basis of such an agreement.”<sup>2</sup>

Ahmad Abu al Wafa defines arbitration as: “an agreement to refer the dispute to a specific person or persons to decide on it. According to this agreement, a party waives his right of litigating before the national courts, as the arbitrators’ decision shall be binding on the parties.”<sup>3</sup>

It is outside the scope of this work to provide a comprehensive list of all definitions that have been provided in this regard. However, one can recognise that arbitration has general features; it is an agreement between two parties who accept by their consent to resolve their future or existing disputes by an arbitrator or arbitrators.<sup>4</sup> The agreement to

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<sup>1</sup> David, Rene, *op. cit.*, p. 5.

<sup>2</sup> *Ibid.*, p. 5.

<sup>3</sup> Ahmad Abu al Wafa, *Compulsory and Voluntary Arbitration*, 5<sup>th</sup> Ed., Monsha’at al Ma’arif, Alexandria (1988), p.15 (in Arabic); also see, Samia Rashed, *Arbitration in Private International Relations*, First Book (Arbitration Agreement), Dar al Nahdah al Arabiah (1984), p. 75 (in Arabic); Ibrahim Ahmmad Ibrahim, *Private International law*, 3 ed. Dar Al Nahdah Al Arabiah, (2000), p. 40. (in Arabic). He defines arbitration as: “a legal system which enables the parties to resolve their dispute without resorting to the courts.”

<sup>4</sup> It has been said that the consensual nature is the cornerstone of arbitration. See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 6.

arbitrate will normally establish the constitution of the arbitral tribunal and its jurisdiction<sup>5</sup>; parties must comply with the resulting arbitral award as a final and legally binding decision, or otherwise, an award may be enforced with the assistance of the state authorities.

Several legal systems and international conventions provide definitions of the arbitration process, and these generally comprise the same features as stated above. For example, Article 7(1) of the Model Law provides a general description of what may constitute an arbitration agreement:<sup>6</sup>

“[an] agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

Section 6 (1) of the English 1996 Act provides that:

“In this part an ‘arbitration agreement’ means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).”<sup>7</sup>

Article 4 (1) of the Egyptian Law No 27 of 1994 provides that:<sup>8</sup>

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<sup>5</sup> The arbitration agreement may be drafted in a simple way, by referring the dispute to be resolved by an arbitral tribunal or it may be extremely detailed, where parties may include in the arbitration agreement the procedures according to which the arbitrators should administrate and it may include the law or the rules that shall govern the substance of the dispute.

<sup>6</sup> Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, (1985). The UNCITRAL Model Law, is a system of arbitration laws which plays a significant role in establishing rules of arbitration that are acceptable in countries with different legal, social and economic systems in order to develop and harmonises these legal systems. See, Gerold Herrmann, “The UNCITRAL Model Law – its background, salient features and purposes,” 1 *Arb.Int.*, (1985), p. 6.

<sup>7</sup> V. V. Veeder, “English Arbitration Act of 1996 (ENGLAND),” *Int. Handbook on Comm. Arb.*, Suppl. 26, February (1998), Binder 2, p.1. The writer states that: “English courts have considered arbitration as a contractual method of resolving disputes, by which parties can agree to entrust their dispute to the final decision of an arbitral tribunal. The arbitral tribunal is required to be impartial and parties should bind themselves to accept and implement the resulting decision.”

<sup>8</sup> See Annex B, p. 293.

“For the purpose of this Law, the term ‘arbitration’ means voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organisation or centre.”

The New York Convention refers to the arbitration agreement in the context of recognition and enforcement of such agreements. Article II (1) of the Convention provides:

“Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”.

One should recognise that Article II (1) of the New York Convention requires that an arbitration agreement be made in writing. This requirement is necessary since arbitration is based upon the will of the parties, and accordingly both parties have an interest in proving the existence of a valid arbitration agreement. Also, having a valid arbitration agreement obliges the court to refer the parties to arbitration.<sup>9</sup> Therefore, a party cannot claim before the court on the same subject matter unless the court finds that the arbitration agreement is null and void, incapable of being performed or contrary to public policy.<sup>10</sup> A written arbitration agreement is also necessary to guarantee the

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<sup>9</sup> See Article II (3) of the New York Convention. This also depends on a request which should be made by a party not later than when submitting his first statement on the substance of the dispute. In this regard, the Egyptian Court of Cassation referred to such request as a plea that must be raised by a party before any discussion of the merits of the dispute. Case. 24.05. 1966, year 17<sup>th</sup>, page 1224; see also Case. 15.02.1972, year 23, p. 168; Case. 06.01.19976, year 27, p. 138. See, Abdul Hamid El Ahdab, “The New Egyptian Act in Civil and Commercial Matters,” 12 *J. Int. Arb.*, June (1995), p. 65 at 75; the same has been provided in Article 13 of the Egyptian law of 1994; also see Article 8 (1) of the Model Law.

<sup>10</sup> Mohamed I.M. Aboul-Enein, “The principles on which arbitration is based and practiced in Arab and African Countries adopting the UNCITRAL Model Law of Arbitration,” 1 *Journal of Arab Arbitration* (1999), p. 4.

recognition of such agreement as this is required by some legal systems.<sup>11</sup> The difficulty that may arise from this requirement is that national laws differ as to when the written form of the arbitration agreement is met. Several legal systems<sup>12</sup> and the Model Law provide a clear guide of what may constitute a written form. Article 7 (2) of the Model Law includes, “telex or other means of telecommunication which provide a record of the agreement”.<sup>13</sup> The Model Law considers the reference in a contract to a document containing an arbitration clause as constituting a valid arbitration agreement, providing that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>14</sup>

## **A. Definition of arbitral awards**

Having defined the general features of what may constitute an arbitration agreement, one must seek to find a definition of the arbitral award itself. Scholars agree

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<sup>11</sup> Not including an arbitration agreement in a written form could be a reason to invalidate the arbitration agreement in countries which consider such requirement as fundamental. See, for example, Article 12 of the Egyptian law of 1994: “The arbitration agreement must be in writing, on penalty of nullity. An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams or other means of written communication”; to the same conclusion this was decided by the Netherlands’ Courts in *North American Soccer League Marketing Inc. (US) v Admiral International Marketing, and Trading BV and Frisol Eurosport BV*. Court of First Instance, Dordrecht (Netherlands), August 18, (1982), Yearbook Commercial Arbitration 1985, vol. X, at 490. An arbitral award was invalidated for lack of written form of the arbitration agreement. Cited by Rubino Sammartano, M., *International Arbitration Law*, Kluwer, 1990, p.151.

<sup>12</sup> See for example, Section 5 of the English Act of 1996; Article 12 of the Egyptian Law No. 27 of (1994).

<sup>13</sup> The same approach was considered by the English Court of Appeal in *Birse Construction Ltd v St David Ltd* [2000] B.L.R. 57; 70 Con. L.R. 10.

<sup>14</sup> It has been reported that the New York Convention also includes an exchange of letters or telegrams as agreement made in writing, regardless of whether or not it was signed by one of the parties. See Berg, van den A. J., *The New York Arbitration Convention of 1958*, The Hague Deventer, Netherlands: kluwer (1981), p. 171.

that there is a lack of clear definition as to what may constitute an award.<sup>15</sup> It has been reported that during its deliberation on the Model Law, the Working Group repeatedly emphasised the great significance of defining the term arbitral award, as this was intended to determine which kinds of decisions would be subject to recourse under Article 34 of the Model Law. However, several proposals were rejected, as it was not clear whether the questions of procedure should be treated as arbitral awards, and the Working Group decided not to include a definition in the Model Law.<sup>16</sup>

Nevertheless, there are general features that may constitute what could be considered as an arbitral award.<sup>17</sup> An arbitral award is the final procedure in the arbitration process, by which the arbitral tribunal determines all of the issues that have been submitted by the parties to arbitration<sup>18</sup> in a certain and final order. The arbitral tribunal's decision then terminates the arbitral proceedings and shall be binding on the parties.<sup>19</sup>

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<sup>15</sup> There is no internationally accepted definition of the term "award". Redfern & Hunter provide that none of the international conventions which deal with arbitration provide a definition of the arbitral award, including the Geneva Treaties, the New York Convention or the Model Law. Even though the New York Convention is specifically directed to the recognition and enforcement of awards, the nearest it comes to a definition is: "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted"; Article I (2) of the New York Convention; See, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, 3ed, London: Sweet & Maxwell (1999), p. 364.

<sup>16</sup> See, Berger, Klaus. P. *International Economic Arbitration*, Denver Boston: Kluwer, (1993), p. 588, referring to the UN Doc. A/CN.9/246, para. 194; A/CN.9/264, Article 34, para. 3.

<sup>17</sup> One should keep in mind that these general features vary according to what the applicable rules will state.

<sup>18</sup> In *Tatem Steam Navigation Co Ltd v. Anglo-Canadian Co Ltd* (1935) L1. L. R 161. The court defined the meaning of "All matters within the arbitrator's jurisdiction" as: "... all matters that have in fact been raised before him; that is, upon which either party relied. Points which have not specifically been raised by either party or argued will not invalidate an award."

<sup>19</sup> This includes both the arbitral tribunal's decision and the parties' agreement to resolve the dispute in a settlement award. The legal nature of settlement awards will be examined later in this chapter. See ahead, p. 13.



One should take into consideration here that the arbitral tribunal may render orders or awards during the arbitration proceedings, such as interim or partial awards.<sup>20</sup> However, examining such awards is outside the scope of this research, since they do not meet with the requirements of a final and binding arbitral award that could be enforced in foreign countries. There have been doubts about the enforceability of such pre-award orders under the New York Convention. Many writers consider such orders or awards to be non-enforceable under the New York Convention, due to the lack of finality of the award and the possibility that a reverse decision could still be taken by the arbitrators on the same issue.<sup>21</sup> This does not meet the requirement of Article V (1)(e) of the New York Convention that the award contain a conclusive decision which is not subject to further revisal by the tribunal within the arbitral proceedings.<sup>22</sup> The focus of this study concerns only the final award which puts an end to all of the issues that have been submitted to arbitration, and which is ready to be enforced as a foreign arbitral award, rather than examining such other orders or awards as may be made by the tribunal during the arbitration process.

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<sup>20</sup> There are several types of decisions that can be made by the arbitral tribunal. In the course of the arbitration procedure, the arbitrators may have to render several decisions either procedural or substantive, such as, injunctions, procedural orders, interim awards, interlocutory awards, partial awards, consent awards, final awards etc. For example, Article 2 (iii) of the ICC Rules, defines an award as it includes, *inter alia*, an interim, partial or final Award; also see, V. V. Veeder, *op. cit.*, p. 47.

<sup>21</sup> Klaus Peter Berger, *op. cit.*, p. 345.

<sup>22</sup> See Micheal Pryles, "Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell," 10 *Arb. Int.*, (1994), p. 385. However, other scholars consider that interim or partial awards are also enforceable under the Convention as long as they *finally* resolve a part of the dispute. See Pierre-Yves Gunter, "Enforcing Arbitral Awards, Injunctions and Orders," *Internet Address*: <http://www.psplaw.ch/Publications/AMBAR-1.html>.

## B. The legal nature of arbitral awards

It is important to understand the obligatory power of arbitration and its resulting award by analysing the legal nature of the arbitral award. Two questions arise here: first, where does arbitration get its obligatory power; and second, whether the decision of an arbitral tribunal is to be regarded as equivalent to a court decision, or is it to be treated as a private agreement? This problem creates a great deal of complexity, especially in the case of foreign arbitral awards.<sup>23</sup> It is, therefore, important to decide whether these awards are to be considered as having the character of a contract, or of a foreign judgement.

Two issues have to be considered in this regard. On the one hand, since arbitral awards derive their binding force not from the sovereignty of the state, but from private contract<sup>24</sup>, and therefore the tribunal's decision should be considered to be no more than supplemental to the arbitral agreement.<sup>25</sup> On the other hand, arbitration could be regarded as part of the judicial system of the state. According to the latter view, it has been argued

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<sup>23</sup> This is important in order to determine the law that should be applied to the enforcement of the award and the possibility to apply an international convention for the enforcement of foreign arbitral awards, such as, the New York Convention, or otherwise, to apply other Treaties that relate to the enforcement of foreign judgements.

<sup>24</sup> See Jan Paulsson, "Arbitration Unbounded : Award Detached From the Law of Its Country of Origin," 30 *INT'L & COMP. L. Q.*, (1981), p. 362. He states that: "An arbitrator derives his/her power from the powers conferred by the parties. His/her authority is entirely a private matter "and it would be a rather artificial interpretation to deem his/her power be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration."

<sup>25</sup> Carlo Croff, "The Applicable law in an International commercial Arbitration: Is It Still a Conflict of Laws Problem?" *Int.Law.*, (1982), p. 613. This was the trend followed by the Egyptian courts. In a judgement rendered by the Giza Court on 27 January 1987, cases No. 10063/83 and 5795/85, the court held that: "Arbitration belongs to the category of contracts consensual, which come into existence through the exchange of an offer and acceptance without requiring any special form whether in respect of the arbitration clause or the submission agreement"; Ahmed S. El-Kosheri, "EGYPT," *Int. Handbook on Comm. Arb.*, Suppl. 26. February (1998), Binder, 2., p. 8.



that the arbitral award may not become legally binding and ready to be enforced unless it has been confirmed or declared enforceable by a competent authority, mainly by a court order.<sup>26</sup> Proponents of this view argue that if such confirmation is required and the award was confirmed or declared enforceable by a court in the country where it was made, then the award should be regarded as having the nature of a judgement. Moreover, the supporters of this view argue that the competent authority to undertake justice in a state is a function which belongs to the public authorities of the state where this authority derives its jurisdiction from the law. An arbitral tribunal also derives its authority from the same source, as the law permits the parties to oust the jurisdiction of the courts and agree to resolve their dispute by private persons. Thus the law, in permitting such ousting of jurisdiction, is what makes the arbitral award equivalent to a judicial decision made by a state court.<sup>27</sup>

Without exploring the above two opinions in depth, one may say that an arbitral award has a mixed nature.<sup>28</sup> It is based on an arbitration agreement between the disputing parties and it ends by a decision made by the arbitral tribunal. This distinctive nature of the arbitral award makes it different from an agreement, as it could be enforced without requiring the merits of the case to be reviewed by a state court. Also, arbitration is not part of the judicial system provided for by the state, since the decision arrived at by a court is different from an arbitral award. The Court decision is rendered by judges who derive their authority from the state, whereas the power of the arbitrators is derived from

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<sup>26</sup> *Merrifield Ziegler & Co. v. Liverpool Cotton Association Ltd.*(2) (1911) 105 Law Times 97.

<sup>27</sup> Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 8.

<sup>28</sup> Rene David, *op. cit.*, p. 78 and 133. He considers arbitration as having a mixed nature. "It is an institution both within the law of contract and within the law of procedure"; also Ibrahim Ahmmad Ibrahim, 3ed., *op. cit.*, p. 28. He considers that arbitration has its own nature.

a commission given to them by the parties.<sup>29</sup> Also, the rules applying to the enforcement of arbitral awards are generally different from those applying to the enforcement of court decisions<sup>30</sup>, especially if we consider the role of the international conventions that govern the enforcement of foreign arbitral awards, such as the New York Convention of 1958.

### *Legal nature of Awards in agreed terms*

One should consider the different nature of settlement awards or what is known as awards in agreed terms. During the arbitration proceedings parties may decide to resolve their dispute by a settlement which ends the dispute and may ask the arbitrator to record the settlement agreement in the arbitral award.<sup>31</sup> The trend in most of the internal and international arbitration rules is to consider settlement awards as arbitral awards that can be enforced like any arbitral decision.<sup>32</sup> Several legal systems and the Model law have followed this trend.<sup>33</sup> For example, Section 51 of the English 1996 Act regard such

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<sup>29</sup> Parties to arbitration enjoy a greater degree of control which may be passed to the arbitrators. Therefore, the consensual basis of an arbitration thus radically different from that of plaintiff and defendant in litigation in the courts. See *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909. p. 964; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.).

<sup>30</sup> One should consider here that there are exceptional cases, as some legal systems provide the same rules for the enforcement of foreign arbitral awards and foreign judgements. This is the case in some countries, for example, the Jordanian law for the Enforcement of Foreign Awards No 8 of 1953 is applicable to both the enforcement of foreign arbitral awards and foreign court decisions.

<sup>31</sup> Parties may prefer to see their agreement ratified and confirmed by an arbitral tribunal as an award on agreed terms, or as an award by consent. See Rubino Sammartano . M., *op. cit.*, p. 438.

<sup>32</sup> Settlement awards can be enforced under the New York Convention. See Van den Berg, *op. cit.*, p. 49.

<sup>33</sup> Article. 30 of the Model Law of (1985) provides that: "An award on agreed terms... shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case"; also see, Article 26 of the ICC Rules of 1998; Article 26 (8) of the LCIA Rules of 1998; Article 41 of the Egyptian law of 1994; also see, Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 38.

agreed awards as having the same status and effects as any other award on the merits of the case. Section 51 provides a non-mandatory rule that, unless otherwise agreed by the parties, the tribunal shall terminate the substantive proceedings and if so requested by the parties, and not objected to by the tribunal, shall record the settlement in the form of an agreed award.<sup>34</sup>

One may conclude here that recording in the award that it is an award on agreed terms gives a settlement award the same legal nature as a decision made by the arbitral tribunal. This also explains the power of the arbitral tribunal over the settlement award, as the tribunal could refuse to confirm the parties' settlement if it violates public policy<sup>35</sup>, such refusal may deprive the settlement award from its legal nature as a final arbitral award ready to be enforced.

In the light of the definitions explored above, the study will now turn to the question of how and on which bases the character of foreign arbitral awards can be determined. To address this matter, it will be necessary first to distinguish between domestic and international commercial arbitration, and then to determine whether the

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<sup>34</sup> Section 51 (3) of the English 1996 Act. One should mention in this regard that a signature of the two parties is required. See Section 52 of the English 1996 Act. For the question of what happens when a dispute arises from the settlement agreement itself (would it be settled by the former arbitration clause or does it necessitate a new arbitration clause?) see, Klaus Peter Berger, *op. cit.*, pp. 583- 587.

<sup>35</sup> *Ibid.*, p. 584. The writer states that arbitrators can refuse to render the award on agreed terms if "the terms of the settlement are illicit or utterly unfair, or obviously violate mandatory norms or the *order public international*"; also see, Andrew Tweeddale and Keren Tweeddale, *A Practical Approach to Arbitration Law*, Blackstone Press Ltd. (1999), p. 169; D Mark Cato, *Arbitration Practice and Procedure*, Lloyd's of London Press Ltd (1992), p. 88; The drafters of the UNCITRAL expected the tribunal to refuse to record as awards those settlements that they deem unlawful or against public policy at the place of arbitration. See UN Doc. A/CN.9/SER.A/1976, p. 179.

criteria that are used in distinguishing between domestic and international arbitration could also be used to determine the character of foreign arbitral awards.

## **II. International Commercial Arbitration and International Arbitral Awards**

Domestic arbitration is known as such because it has a close connection with the place in which arbitration procedures took place. There are several factors that link the nature of the arbitration process and resulting final award with the state in which the arbitration took place. For example, where the transaction which is the subject of arbitration has been constituted and ought to be performed in a given state, and the arbitration procedures and the substance of the dispute are governed by the law of that state, the arbitral award will be made and enforced in the territory of that state. According to this example all elements point to a sole and particular state.<sup>36</sup>

International commercial arbitration on the other hand, indicates that one or more foreign elements are involved in arbitration which, therefore, make it not wholly connected to the state in which arbitration proceedings take place. One should here consider that in international commercial relations, parties may have different nationalities, or they may be domiciled in different countries, and the transaction may relate to goods to be delivered in a country other than the country where they made their contract. Therefore, determining the context of international commercial arbitration

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<sup>36</sup> Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Deventer: Kluwer Law and Taxation Publishers, (1989), p. 1055.

requires consideration of a number of key connecting factors: the nationality of the parties; the seat where the arbitration took place; the law applicable to the dispute; and whether or not the award is intended to be enforced within the jurisdiction of the national courts.

Generally, there are two main criteria that have been used to determine the nature of international commercial arbitration.<sup>37</sup> The first criterion mainly considers the parties to an arbitration, that is, their nationality, their habitual place of residence, or, if the party is a 'corporate entity', the seat of its central control and management. However, this criterion disregards the fact that sometimes parties of the same nationality or parties who are resident in the same country may be engaged in international business transactions. Therefore, it may not be sufficient to determine the nature of international commercial arbitration by relying on this criterion alone. The second criterion involves analysing the nature of the dispute, so that arbitration will be treated as international if it involves the interests of international trade, regardless of the parties' nationality.<sup>38</sup> The latter approach is followed in the ICC Rules, Article 1(1) of which uses 'the nature of the dispute' as a test in order to determine the jurisdiction of the International Court of Arbitration of the ICC. It provides that:

"The function of 'the Court' is to provide for the settlement by arbitration of business disputes of an international character..."

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<sup>37</sup> Other less popular criteria could be mentioned here: The nationality of the arbitrators; The country where the principal place of the arbitral organisation is situated; and the country whose courts would have had original Jurisdiction to hear the case. However, all of these criteria have been heavily criticised. Mahmoud S. El-Sharkawi, "The Terms International and Commercial under the New Egyptian Arbitration Law," 1 *Journal of Arab Arbitration* (1999), p. 11 at 14.

<sup>38</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 15; Andrew and Keren, *op. cit.*, p. 4.

Accordingly, the ICC prefers to rely upon the character of the dispute rather than relying on the parties' different nationality. This was confirmed by an ICC publication:<sup>39</sup>

“By virtue of its object the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same state for performance in another country, or when it is concluded between a state, and a subsidiary of a foreign company doing business in that state.”

In one particular case the ICC tribunal held that the arbitration before it was truly international because the arbitration was based on a contract involving the parties of different nationalities, the movement of equipment and services across national frontiers, and the payment in different currencies.<sup>40</sup>

Through a review of the different international and domestic law rules, one could recognise that there are different ways to identify the international nature of a particular arbitration. In this regard Article 1 (3) of the UNCITRAL Model law provides various tests for determining when arbitration is international. It uses both the different place of business of the parties and the nature of the dispute as tests and provides two additional criteria. Firstly, the situation of the arbitration proceedings outside the place of business of one of the parties.<sup>41</sup> Secondly, if the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country. The latter criterion may create some difficulties, as parties who are nationals of the same state could declare an otherwise domestic arbitration to be international by merely stating that the subject matter

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<sup>39</sup> The International Solution to International Business Disputes- ICC Arbitration, (ICC Publication No. 301, 1977) at 19.

<sup>40</sup> ICC Award 5029/1986, Volume II, 1986-1990, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, *Collection of ICC Arbitral Awards*, p. 69.

<sup>41</sup> Article 1 (3)(a) and (b) of the Model law; also see the criteria provided in paragraph (b) of the same Article.



of their arbitration agreement relates to more than one country.<sup>42</sup> They may do that in order to benefit from the liberal treatment of international commercial arbitration or to circumvent mandatory rules that are specifically designed to regulate domestic arbitration.<sup>43</sup>

The Egyptian arbitration law of 1994 has set several criteria to determine when arbitration is international, and is broad enough to cover a wide range of cases. Article 3 classifies arbitration as international:

“Whenever its subject matter is a dispute related to international commerce in any of the following cases:

**First:** if the principal places of business of the two parties to the arbitration are situated in two different states at the time of the conclusion of the arbitration agreement. If either party to arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon. **Second:** If the parties to the arbitration have agreed to resort to a permanent arbitral organisation or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.<sup>44</sup> **Third:** If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country. **Fourth:** If the principal places of business of the two parties to the arbitration are situated in the same state at the time of the conclusion of the arbitration agreement, but one of the following places is located outside said state:

(a) the place of arbitration as determined in the arbitration agreement pursuant to the methods provided therein for determining it; (b) the place where a substantial part of the obligations emerging from the commercial relationship between the

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<sup>42</sup> See Article 1 (3)(c) of the Model Law.

<sup>43</sup> This subject will be examined in more depth in Chapter Three, see p. 101.

<sup>44</sup> The Egyptian Court of Cassation held on various occasions that arbitration can take place abroad, in spite of the fact that Egyptian courts would have certainly had jurisdiction if the parties had not agreed to arbitrate abroad. Decision of 12 April 1956. Case No. 369 - 22nd; Decision of 26 April 1982 Case No. 714, 47th; Decision of 13 June 1983. Case No. 1259. 49th; Decision of 21 January 1985, Case No. 245. 50th; Decision of 13 January 1986. Case No. 326. 51st; Decision of 5 May 1975. Case No. 450, Collection of Court of Cassation Decisions (26), p. 535. See Ahmed S. El-Kosheri, “EGYPT,” *op. cit.*, p. 50; Ashraf al Rifaie, *Order Public and Arbitration of Private International Relations*, PhD thesis, Ein Chams University, Egypt (1996) (in Arabic), p. 179.



parties shall be performed; (c) the place with which the subject matter of the dispute is most closely connected.”

It should be noted that the Egyptian law has adopted the same approach provided for in the Model Law. The above article adds however, that an arbitration is ‘international’ if the parties agree to hold the arbitration proceedings in a permanent arbitral institution situated in Egypt<sup>45</sup>, in reference to the Cairo Regional Centre for International Commercial Arbitration (CRCICA)<sup>46</sup> or even abroad, such as the (ICC)<sup>47</sup>, (AAA)<sup>48</sup>, (LCIA).<sup>49</sup>

In England the distinction between domestic and non-domestic arbitration agreements is based on the nationality, habitual residence, place of incorporation or central control and management of the parties. This approach was first introduced in the 1975 English Act and repeated in the 1979<sup>50</sup> and 1988 Acts. Section 85 (2) of the 1996 Act defines domestic arbitration as:

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<sup>45</sup> Mahmoud S. El-Sharkawi, *op. cit.*, p. 14; Ahmad Sharaf al Deen, *Arbitration in Disputes of International Contracts*, Abna’a Wahbah Hassan publishers (1993), p. 74 (in Arabic); Ashraf al Rifaie, *op. cit.*, p. 112 (in Arabic); Mohamed I.M. Aboul-Enein, “The Development of International Commercial Arbitration Laws In the Arab World,” a paper presented to the conference of “International Commercial Arbitration” Cairo, January 28. 2000, p. 7.

<sup>46</sup> The Cairo Regional Centre for International Commercial Arbitration (CRCICA). Under the Auspices of the Asian African Legal Consultative Committee (AALCC). See *Internet address*: (<http://www.crcica.org.eg>).

<sup>47</sup> International Chamber of Commerce (ICC) Court of Arbitration. See *Internet address*: (<http://www.iccwbo.org>).

<sup>48</sup> The American Arbitration Association (AAA) Commercial Arbitration. See *Internet address*: (<http://www.adr.org>).

<sup>49</sup> The London Court of International Arbitration 1998 (LCIA). See *Internet address*: (<http://www.lcia-arbitration.com>).

<sup>50</sup> Article 3 (7) of the Arbitration Act of 1979 defines as domestic arbitrations which take place in the United Kingdom, if the parties to them are UK citizens at the time they enter into the submission agreement. See, Rubino-Sammartano. M., *op. cit.*, p. 15.

“An arbitration agreement to which none of the parties is- (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.”

Accordingly, any arbitration, which is not domestic according to this definition, is therefore by implication, international in character. However, Section 85 (2) was not brought into force since it establishes the distinction between national and international arbitration on the parties' nationality, which was considered as violating Article 6 and 25 of the Treaty of Rome<sup>51</sup> for creating direct or indirect discrimination against foreign citizens and legal persons of the European Union.<sup>52</sup>

The question now is to what extent are the criteria thus far considered applicable in regard to determining the character of arbitral awards? The following section will explore this question and argue that international arbitral awards may be seen as such because they result from international arbitration and therefore they should be distinguished from foreign arbitral awards.

## **A. Domestic arbitral awards and international arbitral awards**

Generally, there are two types of arbitral awards - domestic arbitral awards and international arbitral awards. The first type, are known as such because they result from

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<sup>51</sup> Treaty Establishing the European Community as Amended by Subsequent Treaties Rome, 25 March, 1957. Article 6 provides that: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 189c may adopt rules designed to prohibit such discrimination.”

<sup>52</sup> See, V. V. Veeder, *op. cit.*, p. 5; *Philip Alexander Securities and futures Ltd v Bamberger* (1996) 22 *Y.B. Com. Arb.*, 872; Andrew and Keren, *op. cit.*, p. 273.

domestic arbitration as explained above. The second type, international arbitral awards, should also be considered as such because they result from international commercial arbitration, therefore, determination of their nature should be based on the same criteria that are used in deciding the international nature of arbitration.<sup>53</sup> The distinction that can be drawn between these two types may relate to the courts' treatment of international arbitral awards. International arbitral awards that result from international arbitrations should be treated under more liberal standards than purely domestic awards- (for example, by giving greater weight to the parties' autonomy by applying a foreign law to govern the procedures or the substance of the dispute if this was agreed upon by the parties). This may lead to the application of more liberal standards when national courts of the country in which the award was made are asked to set the award aside for considerations of public policy, as will be explored in more detail later.<sup>54</sup>

In light of the above, foreign arbitral awards should be distinguished from international arbitral awards. A foreign arbitral award is known as such because the award will be enforced in a country that considers it foreign regardless of whether it is considered a domestic or international arbitral award in the country in which it was made.

## **B. Foreign arbitral awards**

One cannot determine the nature of foreign arbitral awards on the same criteria used above in deciding the nature of international arbitration. As explained above,

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<sup>53</sup> See Article 1 (3) of the Model Law; Article 3 of the Egyptian law of 1994; Section 85 (2) of the English 1996 Act.

<sup>54</sup> National courts are only expected to exercise a limited degree of control over international arbitral awards. This will be explained in more depth in the following chapters.

deciding the international nature of arbitration may rely on the existence of several elements, such as the different nationality or domicile of the parties. Using such elements may not be suitable in deciding the nature of foreign arbitral awards. For example, the nationality of the parties is an irrelevant factor to determine the nature of foreign arbitral awards, since the New York Convention is applicable to the situation where an award is made abroad in an arbitration between parties of the same nationality.<sup>55</sup> This can also be inferred from the title of the New York Convention as it refers to “the Recognition and Enforcement of Foreign Arbitral Awards” and not to enforcement of international arbitral awards.

However, determining the nature of foreign arbitral awards can be achieved through using two different criteria. The first is the geographical criterion, and the second is according to the applicable procedural law.<sup>56</sup>

## **1. The geographical criterion**

Various international conventions and arbitration rules of national laws and international institutions indicate that there is a preference for the nationality of the place

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<sup>55</sup> One should mention here that the application of New York Convention to cases which involve parties of the same nationality may cause problems in jurisdictions that require in an international arbitration to be between foreigners. See Van den Berg, *op. cit.*, p. 16. The writer states that: “This was the case under Article 2 of the Italian Code of Civil Procedure, where on the base of this Article, the court of First Instance of Ravenna refused to enforce an award made in London in an arbitration between two Italians. *S.P.A. Paulo v. Augusto Miserocchi*, Tribunal of Ravenna, April 15, 1970, Italy no. 3. However, the Italian Supreme Court reversed this decision on this point and in subsequent decisions the Italian courts have affirmed the decision of the Italian Supreme Court, where this issue seems to be settled.”

<sup>56</sup> The New York Convention is established on these two criteria, Article 1(3) provides that; “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

where the award was made. For example, Article 1 of the Geneva Convention of 1927<sup>57</sup> deals with awards made in the territory of another contracting state. Article I (1) of the New York Convention deals with recognition of awards made in the territory of a state other than that in which recognition is applied for.<sup>58</sup> This means that an award is national if it was made within the territory over which the courts of that state exercise their jurisdiction, otherwise the award will be a foreign arbitral award if it was made outside of the territory of the state.<sup>59</sup>

However, the geographical criterion is not always satisfactory, as parties of the same nationality may agree to arbitrate abroad on a domestic transaction, in order that they can enforce the resulting award in the country of their origin under the provisions of the New York Convention. Moreover, applying the 'geographical criterion' may lead to problems concerning arbitrations which have been held in one country, but have been subscribed by the arbitrators in another country. This type of problem can occur in international commercial arbitration. In the case of *Hiscox v. Outhwaite*,<sup>60</sup> the House of Lords held that an award which had been signed in Paris is a French award, notwithstanding the fact that the entire arbitration had been conducted in England under

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<sup>57</sup> Geneva Convention on the Execution of Foreign Awards, September 26, 1927, League of Nations Treaty Series (1929-30) Vol. XCII, p. 302.

<sup>58</sup> This may include awards that have been rendered in countries which are not party to the New York Convention, unless a member state has elected to apply the convention on "reciprocity basis", by declaring that it will apply the Convention only to arbitral awards made in the territory of another Contracting State. See Article I (3) of the New York Convention.

<sup>59</sup> This criterion is adopted in many laws and also by the New York Convention, although this convention recognises that some arbitral awards rendered within the territory of the state, may not be regarded as national awards in the state according to Article I (1), as will be explained in the second criterion.

<sup>60</sup> *Hiscox v. Outhwaite* [1992] 1 A.C. p. 562; [1991] 3 W.L.R. p. 297; [1991] 3 All E.R. p. 641; [1991] 2 Lloyd's Rep. P. 435.

English law. Consequently, the award was considered 'foreign' in terms of the New York Convention. According to this decision, the English courts were deemed competent not only to set the award aside but also to determine the enforcement of the award as a foreign arbitral award. This decision was criticised as leading to "the dilution of the territoriality principle".<sup>61</sup>

## **2. The applicable law criterion**

The second criterion is also provided in Article I (1) of the New York Convention, which defines foreign arbitral awards by including both the first and the second criteria. Part two of Article I (1) of the Convention provides that: "it shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".<sup>62</sup> The formula used in Articles I (1) was intended, as the Convention considered that some countries may regard arbitral awards, which have been made under foreign arbitration rules, as foreign awards.<sup>63</sup>

According to this criterion the nationality of an arbitral award can be determined according to the applicable law. For example, if an award was made in state A, but governed by the procedural law of state B then, it will be considered as having the nationality of state B. Accordingly, if the arbitration procedures were governed by a

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<sup>61</sup> See Klaus Peter Berger, *op. cit.*, p. 657.

<sup>62</sup> Also see, Article V (1)(e) of the New York Convention, which provides that enforcement of the award could be refused if the award had been set aside "in the country in which, or under the law of which, that award was made".

<sup>63</sup> Van den Berg, *op. cit.*, p. 23, referring to France and Germany as examples; also see, the ECOSOC Draft of 1955, the UN DOC E/ 2704.

foreign law the resulting award will then be regarded as a foreign arbitral award, even if it was made within the territory of the state where arbitration took place.

In conclusion, foreign arbitral awards are different from purely domestic and international arbitral awards. This distinction becomes relevant when enforcement of the award is confronted. As on the one hand, resisting the enforcement of national arbitral awards can be achieved by means of appealing or challenging to set the award aside, which may take place before the competent authority of the country in which or under the law of which the award was made. In contrast, recognition and enforcement of foreign arbitral awards takes place in a country that considers the award foreign, and thus subject to different rules which includes the application of international conventions.<sup>64</sup>

The distinction between national arbitral awards and foreign arbitral awards has been recognised by several national and international arbitration rules which are mainly based on the procedure that should be followed in resisting the enforcement of each type. For example, Article 34 of the UNCITRAL Model Law provides grounds for setting a national arbitral award aside separate from the grounds set forth under Article 36 to refuse the recognition and enforcement of foreign arbitral awards. The same distinction is known to several national arbitration laws, for example: Sections 67, 68 and 69 of the 1996 English Act concern challenging arbitral awards which were made in England, whereas Sections 99 to 104 concern the applicable rules to the recognition and enforcement of foreign arbitral awards. Likewise, the Egyptian Arbitration Law of 1994 provides in Article 58 grounds to recourse against a national arbitral award different from

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<sup>64</sup> Such as the rules provided in the New York Convention.



those which are provided in Articles 60 to 63 which concern the enforcement of foreign arbitral awards.

Finally, the extent of control practiced over national arbitral awards may be different from the control practiced over foreign arbitral awards. Various national legal systems demonstrate that foreign arbitral awards should be subject to merely formal control by the courts, by ensuring that certain minimum standards have been observed in the making of the award.<sup>65</sup> This, however, will be explained later in the context of applying the public policy ground as a means to resist the enforcement of arbitral awards, which will be demonstrated in the course of this study.

### **III. Executing Arbitral Awards**

A party who succeeds in a commercial arbitration will expect to be able to enforce the award without any further delay.<sup>66</sup> However, if the losing party refuses to carry out the award voluntarily, then the award, if necessary, can be enforced by a court order.<sup>67</sup>

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<sup>65</sup> Georges R. Delaume, "Reflections on the Effectiveness of International Arbitral Awards," 12 *J.Int.Arb* 1, 1995, p. 6. He provides an additional distinction based upon the effect of the court's decision on the validity of the arbitral award: "Judicial review at the place of making concerns the validity of the award and is of direct relevance to its finality since an adverse decision may lead to the annulment of the award. At the stage of recognition and enforcement of foreign awards, the scope of judicial review is limited to deciding whether the award should be granted or denied recognition. In other words, a denial of recognition may affect the effectiveness of the award but has no bearing upon its validity."

<sup>66</sup> An arbitral award is binding on the parties, not only by the rules applied to the arbitration but also by their agreement. For example, Article 32. (2) of the UNCITRAL Arbitration Rules states that the award shall be final and binding on the parties and that the parties undertake to carry out the award without delay; also see, Article 24 of the ICC Rules of 1998; Article 32 of the LCIA Rules of 1998.

<sup>67</sup> Hazel Fox, "States and the Undertaking to Arbitrate," 37 *Int'l & Comp. L.Q.*, 1988, pp. 2-3. She provides that: "the enforcement powers of the state are made available through its courts to back up the effectiveness of the arbitration process."

This section considers the mechanisms available to ensure that the losing party complies with the terms of the award.

### **A. Voluntary execution**

Voluntary execution may arise in particular cases, such as in business relations which are likely to continue, or when the arbitration has been administered under the auspices of some trade association of which the losing party is a member.

Commercial pressure is one of the main reasons to ensure the voluntary submission to the arbitral award.<sup>68</sup> This may particularly occur if parties belong to the same social milieu, where they may fear that their reputation would be jeopardised if they do not perform the award voluntarily. They may also fear loss of some of the advantages attached to membership of the association under the auspices of which the award was made.<sup>69</sup> Non-performance may also be interpreted as evidence that one's business is in a critical financial situation. Execution of the award may also be guaranteed by a security constituted when the contract was made or by the fact that property belonging to the losing party is in the hands of the winner.<sup>70</sup>

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<sup>68</sup> Abu Zaid Redwan, *General Sources in International Commercial Arbitration*, Dar al Fihkir al Arabi (1981), p. 49, (in Arabic).

<sup>69</sup> For example, some associations, notably the 'London Corn Trade Association and Grain and Feed Trade Association G.A.F.T.A', can make it easier to obtain an award that is voluntarily executed. See, Pierre Lalive, "Enforcing Awards, in Sixty Years of ICC Arbitration; A Look at the Future", *ICC Int'l Court of Arbitration* ed., 1984, p. 318, 319.

<sup>70</sup> See, Rene David, *op. cit.*, p.357.

The most powerful pressure that may be brought on the reluctant party involves sanctions of a financial nature.<sup>71</sup> If a continuing trade relationship exists between the parties, it may well be in the interests of the losing party to perform the award voluntarily, otherwise he risks the possible future business with the winning party. Other sanctions may take the form of preventing the defaulting party from being authorised in future to resort to arbitration administered by the chamber of commerce or the relevant trade association.<sup>72</sup> This can also be found in the ICSID arbitration<sup>73</sup>, and where the losing party was a state, it may risk not being able to obtain further loans from the World Bank.<sup>74</sup>

Pressure may also be exerted by the threat of adverse publicity. This method is mainly used by trade associations who may also exclude the recalcitrant parties from the relevant association or market.<sup>75</sup> Thus, the trade association to which a party belongs will

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<sup>71</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 418.

<sup>72</sup> For example, according to the standard contract for the sale of 'cereals' drafted by the Economic Commission for Europe of UNO facilities for arbitration may be refused by a defendant if it is known that the plaintiff has refused to perform any arbitral award in a previous case.

<sup>73</sup> International Centre for the Settlement of Investment Disputes. The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which came into force on October 14, 1966.

<sup>74</sup> Moreover, it has been reported that, during recent years, commercial companies and businessmen from 83 countries were able to freeze Saudi assets outside the Kingdom of Saudi Arabia on the basis of international arbitral awards. These awards should have been executed in Saudi Arabia. However, this was not possible and this led businessmen and companies to freeze Saudi Arabia assets abroad. The Kingdom of Saudi Arabia decided to ratify the 1958 New York Convention on the Recognition and Execution of Foreign Arbitral Awards, by issuance of Royal Decree No. M/11 dated 29 December 1993, adopted by the Council of Ministers on 27 December 1993 and published in the Official Gazette (Umm Al Qura) on 21 first January 1994. See, Abdul Hamid El-Ahdab, "Saudi Arabia Accedes to the New York Convention," *J. Int. Arb.*, p. 87.

<sup>75</sup> Henry P. De Vries, 'International Commercial Arbitration: A Contractual Substitute For National Courts', 57 *Tul.L.Rev.*, (1982), p. 44. He states, in footnote 9, that: "In domestic and international commerce, there are sectorial associations or commodities exchanges that inflict sanctions on members who do not observe arbitral awards pronounced according to their

be informed of non-performance so that sanctions may be imposed against him. In such case, publicity may take the form of posting the defaulting party's name on a notice board at the seat of the chamber of commerce, or it may be by a letter circulated to members of the association, or it may adopt any other form, which is regarded as appropriate. Many rules specify that it is within the discretionary power of the governing body of the chamber of an association to act as they think fit in such cases.<sup>76</sup>

The ultimate action for non-performance of an award voluntarily, is execution or enforcement by court proceedings. In addition to that, the arbitral award can also be sufficient to attach the assets of the recalcitrant party. Depriving the losing party of his assets may persuade him to enforce the award without further court procedures.

## **B. Resisting the enforcement of an arbitral award in the country of origin**

If the losing party does not carry out the award voluntarily, then winning the arbitration will only be the first step. Litigation may continue, and become more involved (as the winning party will attempt to enforce the award and the losing party will seek to resist the enforcement). In this scenario, the losing party may challenge any attempt by the winning party to obtain recognition or enforcement of the award, by appealing or challenging the arbitral award in order to set it aside in the country where it was made.

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regulations. The sanctions vary according to the case: they might involve expelling the defaulting member from the association, imposing a penalty, refusing his inscription to stock exchange, blacklisting him, refusal by the association to extend its services to defaulting member, etc."

<sup>76</sup> See. Rene David, *op. cit.*, p. 358.

In the following sections, an examination will be made of challenging the award in the country of origin. As they vary widely in their details, a survey of the various national legal systems' procedures for attacking an award would require a deep comparative analysis of the various national statutory provisions which is outside the scope of this study. Therefore, the following material will provide a general examination of these procedures. A detailed analysis of using public policy as a ground to challenge the award in the country of origin will be handled in Chapter Four.

## **1. Appeal from arbitral awards**

The final decision made by the arbitral tribunal can be subject to an appeal process, which may take place either before another arbitral tribunal or before a court of law.

The first type of appeal could take place if the parties agree to have the merits of the dispute reconsidered by a superior arbitral tribunal.<sup>77</sup> This kind of appeal procedure is a notable feature of the rules of associations specialising in the trade of specific types of goods.<sup>78</sup> Where the parties agree to an appeal procedure to a higher arbitral hearing, the procedure before both tribunals constitutes a uniform arbitration and an action to have the

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<sup>77</sup> If the parties agree to appeal to another arbitral tribunal, then the award could be reconsidered on the merits by an appellate arbitral tribunal. See, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 419.

<sup>78</sup> Rene David, *op. cit.*, p. 359, at *footnote*, 118. He states that: "the possibility of recourse to an arbitration appeal tribunal is envisaged by the law in Austria Article 594, in Belgium Article 1702, and by various articles in the Dutch law of 1984"; Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 43. He provides that in Egypt parties can agree for an arbitral appeal, however, such possibility is uncommon in the Egyptian business community; also see, Section 30 (2) of the English 1996 Act; Rubino-Sammartano . M., *op. cit.*, p. 511. He proposed to institute an "International Arbitration Court of Appeal" under the auspices of an international convention. However, this proposed solution is difficult to be achieved, not only because it needs international co-operation through international convention but also because of the diversity of legal systems between different states.

award set aside may be initiated only against the last final award made by the appeal tribunal.

The second type of appeal takes place before a state court. Allowing appeals from arbitral awards to a court has its advantages and disadvantages. The main advantage is that appealing against arbitral awards to a court may help to ensure a measure of judicial control over the decisions of arbitral tribunals so that, for instance, an award which is in clear violation of the law could be corrected on appeal. On the other hand, there are a number of disadvantages. The first is that the decision of the court might be substituted for the decision of an arbitral tribunal specifically selected by or on behalf of the parties.<sup>79</sup> Second, a party who agreed to arbitration as a private method of resolving disputes may find himself brought unwillingly before courts which hold their hearings in public. Third, and most importantly, the appeal process may be used simply to postpone the enforcement of the award, so that one of the main purposes of international commercial arbitration the speedy resolution of disputes is undermined.

Since parties to international arbitration want to avoid court procedures as much as they can, some arbitration contracts provide for a condition whereby parties can waive the right of appeal to courts. This is achieved by means of an exclusion agreement especially in cases where the arbitration agreement is international.<sup>80</sup> Such exclusion clauses are now found in most of the international institutional rules, which require the

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<sup>79</sup> See, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 421.

<sup>80</sup> An exclusion agreement may be contained in, or incorporated by reference into, the parties' arbitration clause. See Rubino-Sammartano. M., *op. cit.*, p. 462.



parties to carry out the arbitral award without delay and to waive the right to any form of appeal. For example, Article 28 (6) of the ICC Arbitration Rules provides that:

“Every award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”.<sup>81</sup>

The question here is whether the parties are allowed to contract out of any right of appeal. The answer to this question depends on the applicable law.<sup>82</sup> For example, in England, Section 69 (1) of the 1996 Act permits a party to arbitral proceedings (upon notice to the other parties and to the tribunal) to appeal to the court on a question of law arising out of an award made in the proceedings.<sup>83</sup> However, parties to arbitration held in England are allowed under Section 69<sup>84</sup> to contract out of any right of appeal to the court.<sup>85</sup> Under section 69 of the 1996 Act a court can unquestionably give effect to such

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<sup>81</sup> Also see, Article 26 (9) of the LCIA Rules; Article 25 of The Rules of Conciliation Arbitration and Expertise of the Euro-Arab Chamber of Commerce, which explicitly provides that: “Any award made under these Rules should be final and may not be the subject of any form of appeal”.

<sup>82</sup> In Egypt, appeal from an arbitral award to a court was abolished in 1968 under Article 510 of the Code of Civil Procedures, and this has been confirmed in Article 52 (1) of the 1994 law, which states that: “Arbitral awards rendered in accordance with the provisions of this Law may not be challenged by any of the means of recourse provided for in the Code of Civil and commercial Procedures”; Ahmed S. El-Kosheri, “EGYPT,” *op. cit.*, p. 43; Abdul Hamid El Ahdab, “The New Egyptian Act...,” *op. cit.*, p. 96. He provides that this rule was adopted from the Italian Code of Procedure.

<sup>83</sup> An appeal could be established under Section 69 (2)(b) with the leave of the court. According to Section 69 (7), if leave is granted or the parties agree on the appeal, the court may confirm, vary or set aside the award. See, *Taylor Woodrow civil Engineering Ltd v Hutchison IDH Development* [1998] CILL 1434; 75 Con. L.R. 1. A party may lose its right to apply to the court under Section 73, and its exercise is subject to the restrictions under Section 70(2) and (3). For example, the 28 day time limit for application to the court. This 28 day time limit may be extended by the court under Section 79. See, V. V. Veeder, *op. cit.*, p. 59.

<sup>84</sup> Section 69 of the 1996 English Act provides: “(1) ... An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.”

<sup>85</sup> It has been held that the English 1996 Act has abolished the statutory restrictions on pre-dispute exclusion agreements for domestic arbitration agreements and the special categories under Section 4 (1) of the 1979 Act. See Georges R. Delaume, *op. cit.*, p. 11, emphasising that the



exclusion agreements and to any other written agreement in similar terms, such as Article 26 (9) of the LCIA Rules.<sup>86</sup>

However even if the losing party gives up his right to appeal, he is not precluded from initiating setting-aside proceedings before a domestic court against the award that became final with the party's waiver of appeal. Exceptions can be found; some countries - such as Switzerland - may permit the parties to waive all grounds of challenge, including the public policy ground. According to Article 192 (1) of the Swiss Federal Private International Law Act.<sup>87</sup>, if the parties are not domiciled or resident in Switzerland and have no business established in that country, they may exclude all setting-aside proceedings or limit such proceedings to one or several of the grounds listed in Article 190(2). This can be made by means of an express stipulation in the arbitration

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treatment reserved to the 'Special Categories' has been the object of controversy. So much the more, since the parties soon found effective ways of getting around the problem by the simple device of stipulating the law of Bermuda 'based on English law' as the proper law of the contract, while retaining London as the seat of arbitration. However, it has been held that the waiver of any right of appeal contained in the ICC Rules constitutes a valid exclusion agreement under the English 1979 Act. This was held in two cases, before the 1996 Act. The first case was the *Arab African Energy Corp. v. Olieprodukten Nederland B. V.* [1983] 2 Lloyd's Rep. 419. The second was the *Pioneer Shipping Limited v. B. T. P. Tioxide Limited*, "The Nema", (1982) A. C. 724 (H.L.); also see, *Marine Contractors Inc. v. Shell Petroleum Co of Nigeria Ltd* [1984] 2 Lloyd's Rep, p. 77; See, V. V. Veeder, *op. cit.*, p. 62; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 422.

<sup>86</sup> Article 26(9) of the LCIA Rules: "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made". See, V. V. Veeder, *op. cit.*, p. 59.

<sup>87</sup> Article 192 (1) provides: "If neither party is domiciled, habitually resident or has a place of business in Switzerland, they can, by an express declaration in the arbitral agreement or in a subsequent agreement in writing, exclude the right to bring proceedings to set aside the arbitral award; they can also exclude the right to bring setting aside proceedings on the basis of any one or more of the grounds set out in Article 190(2) [of the Act]". Klaus Peter Berger, *op. cit.*, p. 709; Georges R. Delaume, *op. cit.*, p. 13.

agreement or a subsequent agreement.<sup>88</sup> This is also the situation under Article 1717(4) of the Belgian Code Judiciaire.<sup>89</sup>

## 2. Challenging the arbitral award to set it aside

Challenging an arbitral award<sup>90</sup> is a procedural action whereby a party who is disappointed by the solution given in an award, attacks the validity of the final award before the competent authority in the country in which, or under the law of which, the award was made. Generally this procedure takes the form of an application to a court<sup>91</sup> asking the court to set the award aside. The court may either: (a) confirm the award by granting it a recognition order; (b) set the award aside by pronouncing it of no effect

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<sup>88</sup> When parties have excluded all setting aside proceedings, the resulting award will be treated as a foreign award and its enforcement in Switzerland will be governed by the provisions of the New York Convention (Article 192 (2)). William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 *Tul. L. Rev.* 647, 694-95 (1989).

<sup>89</sup> Article 1717 provides: "Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation. Law of March 27, 1985". The difference between Article 192 (1) of the Swiss Act and Article 1717(4) of the Belgian Code is that Belgium has eliminated any kind of judicial control over arbitral awards rendered in Belgium when none of the parties is connected with that country whereas Article 192 (1) of the Swiss Act requires an express stipulation in the arbitration agreement.

<sup>90</sup> Civil law countries use the term, recourse against an award, and this term is used in the Model Law which in Article 34 refers to recourse to a court against an arbitral award; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 430. The writers prefer the term challenge; See, *Lucas Plc v Welsh Development Agency* [1986] Ch. 500, (1986) 15 C.S.W. 374; *Moran v Lloyds* 1983, Q.B. 542; [1983] 2 W.L.R. 672; [1983] 2 All E.R. 200, C.A.

<sup>91</sup> For the problem of determining the competent court. See Rubino-Sammartano, M., *op. cit.*, p. 462-465; in Egypt, Article 9. (1) of the Egyptian law of 1994 provides: "competence to review the arbitral matters referred to by this law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate body in Egypt."

either in whole or in part; (c) remit the award to the arbitral tribunal<sup>92</sup>; or (d) execute the award by attaching assets of the losing party.

In order to constitute a successful attack, the losing party has to establish his petition upon one or more of the grounds, provided for in the law of the country in which, or under the law of which, the award was made.<sup>93</sup> Such grounds are not the same in every legal system, but rather vary from state to state.<sup>94</sup> However, due to the growing recognition of international commercial arbitration as a means to resolve international commercial disputes, most, if not all national arbitration laws now tend to provide limited grounds for challenging international arbitral awards that takes place in their territories.

Certain factors have emerged as prerequisites which could be considered as common to many modern jurisdictions.<sup>95</sup> The reasons for which an arbitral award may be challenged can be grouped into three categories. The first category relates to the validity of the arbitration agreement and arbitrability of the dispute, because the arbitration agreement embodies the basis on which the award is instituted, and the subject matter of the arbitration agreement should be capable of settlement by arbitration. The second category of reasons relates to procedural irregularities. Perhaps the tribunal was not

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<sup>92</sup> In England the jurisdiction to remit an award has been described as “a safety net to prevent injustice”. See, *King v. Thomas McKenna Ltd.* [1991] 2 Q.B. 480; [1991] 2 W.L.R. 1234; [1991] 1 All E.R. 653, C.A.

<sup>93</sup> For convenience the competent authority to set the award aside will be referred to herein as ‘court of origin’ or ‘court in the country of origin’.

<sup>94</sup> One should mention here that there is no international convention to govern the extent of national courts’ control over national arbitral awards. The Geneva Convention (1927) and the New York Convention (1958) do not deal with enforcement in the state of origin, since they both govern the enforcement of foreign arbitral awards which takes place in a state that considers this award as foreign. See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 429; Pieter Sanders, “Consolidated Commentary”, *Yearbook* Vol. VI (1981), p. 204.

properly constituted, the parties were not given a proper opportunity to present their case, the award was based on evidence which was not admissible, the award was not made within the time limit or not all arbitrators took part in the deliberation. The last group of reasons relates to the award itself, if the award is contrary to public policy.<sup>96</sup>

The purpose of such grounds is to situate the award in the context of a statutory framework that provides the state courts with jurisdiction to exercise some degree of control over arbitral awards made within their territory.<sup>97</sup> The difficult question is, to what degree can a national court exercise control over an arbitral award?<sup>98</sup>

One should recognise, however, that when a national court is asked to set aside an international arbitral award it cannot re-examine the merits of the dispute, since the arbitral tribunal already made its decision on this matter, whose decision should be regarded as final.<sup>99</sup> Presuming otherwise will bring the parties back to the starting point, and may force them to bring their dispute before a national court, which is the thing that they were trying to avoid in the first place by resorting to arbitration.<sup>100</sup>

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<sup>95</sup> Rene David, *op. cit.*, p. 370; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 434; Andrew and Keren, *op. cit.*, p. 290.

<sup>96</sup> John H. Laugbein, "Comparative Civil Procedure and the Style of Complex Contracts", (1987) 35 *AM. J. Comp. L.*, p. 381 at p.390; Adam Samuel, "Arbitration in Western Europe – A Generation of Reform," (1991) *Arb. Int.* 319, pp. 352 and 353.

<sup>97</sup> It is therefore worthwhile to find out what the law of the seat says on the requirements and procedures for enforcement as one of the most important factors is the role of the country's courts in the arbitral process. See Jan Paulsson, "The Role of Swedish Courts in Transnational Commercial Arbitration", (1981) 21 *Virginia Journal of International Law*, p. 211, at p.215.

<sup>98</sup> This will be examined in more depth in Chapter Four.

<sup>99</sup> This was confirmed by the Egyptian Court of Cassation in decision No. 274/ 1982 year 49. Cited by Mahmoud Hashim, *General Theory in Arbitration*, Dar Al Fiker Al Arabi (1990), p. 267, (in Arabic).

<sup>100</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 435. The writers emphasised that: "If a court is allowed to review this decision on its merits, then the speed and, above all, the finality of the arbitral

The ultimate effect of a successful challenge is to render part or all of the original decision, null and void. This will affect the enforcement of the award in the country in which it was made, since the arbitral award will lose its legal effect and will not be considered binding on the parties.<sup>101</sup> This also affects the enforcement of the award in any country which has adopted the New York Convention, since the setting aside of an arbitral award in its country of origin is a ground for refusal of recognition and enforcement under Article V (1)(e).<sup>102</sup>

#### **IV. Executing and Resisting the Enforcement of a Foreign Arbitral Award**

In order to enforce an arbitral award in a foreign country, the award must travel from the state in which it was made under one system of law to other states under different systems of law. This operation does not happen randomly. The successful party should first determine the country in which he will carry out the enforcement: generally that in which the unsuccessful party's assets are located. If these assets are situated in different countries, then he will enforce the award in the country in which he can obtain

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process is lost"; Stephen M. Schwebel and Susan G. Lahne, "Public Policy and Arbitral Procedure," *Comparative Arbitration Practice and Public Policy in International Arbitration*, Kluwer Law and Taxation, Pieter Sanders ed. (1987), p. 223. The writers state that: "Extensive judicial review of arbitration awards would frustrate the basic purposes of arbitration, which is sit to dispose of disputes quickly and avoid the expense and delay of extended court proceedings"; also see, Van den Berg, *op. cit.*, p. 349; Bentil, J.K., "Commercial Arbitrators Authorised not to Apply Strict Rules of law and Judicial Reviews," (1992) *Journal of Business Law*, p 26, at p. 29.

<sup>101</sup> Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards", (1959) 8 *AM. J. Comp. L.*, p. 283 at 290.

the best possible results. Two issues have to be taken into account to achieve this result. The first is the existence of a legal system, whether by the New York Convention or by some other relevant treaty or convention, which facilitates the enforcement of foreign arbitral awards between the prospective place of enforcement and the place in which the award was made. The second issue is the attitude of the local courts to requests for recognition and enforcement of foreign awards, that is, whether their outlook is likely to be internationalist or parochial.<sup>103</sup> In addition to that, one should consider the question of what attitude the prospective country of enforcement may adopt on applying more liberal standards of public policy rules to foreign arbitral awards a question which will be examined throughout this research paper.

After determining the country in which the winning party can get the best possible results, then the question will be whether he need first seek the recognition of the award or whether he can enforce the award directly.

#### **A. Recognition and enforcement of arbitral awards**

The terms ‘recognition’ and ‘enforcement’ of arbitral awards are sometimes linked. That is the case in Article 1 (1) of the New York Convention of 1958:

“This Convention shall apply to the recognition and enforcement of arbitral awards...”

The terms are distinct, however. For example, Article 1 of the Geneva Convention of 1927 speaks of ‘recognition or enforcement’:

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<sup>102</sup> However, an award which has been set aside in the country of origin may still be enforceable in other countries if the court where enforcement of the foreign arbitral award is invoked accepts to enforce the award. This will be discussed in more detail in Chapter Four, at p. 170.

<sup>103</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 451.



“... an arbitral award made in pursuance of an agreement whether relating to existing or future differences... , shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon ...”

The same distinction has been made in Article 35 of the Model Law of 1985:

“An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36”.

Recognition must be distinguished from enforcement since the latter is intended to oblige the losing party to carry out the award, while the purpose of recognition is different and more limited.<sup>104</sup> Recognition requires recognising that the award made by the arbitral tribunal is equivalent to that of a judgement issued by a court of law in the state in which recognition is taking place. Recognition may occur if the losing party asks the court to decide on the dispute although it has already been determined by an arbitral award. In this case the party in whose favour the award was made will object on the grounds that the dispute has already been determined, and to prove this he will seek to produce the award to the court and ask the court to recognise it as valid and binding upon the parties. Thus, recognition frustrates the losing party's attempt to obtain a new decision by the courts of the state requested to enforce an award. Enforcement, by contrast, is a positive step compelling the losing party to carry out the award which he is unwilling to carry out voluntarily.<sup>105</sup>

The distinction could also be recognised if we consider that an award may be recognised without being enforced, but if it is enforced, then it has necessarily been

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<sup>104</sup> Rubino-Sammartano. M., *op. cit.*, p. 484.

<sup>105</sup> One should recognise here that recognition is generally less useful, for this reason the large majority of applications concern enforcement. Van den Berg, *op. cit.*, p. 244.



recognised by the court that orders its enforcement. In other words, a distinction must be made between 'recognition' and 'recognition and enforcement'.<sup>106</sup> A court when it grants enforcement of an award, recognises at the same time that the award is validly made, that it is binding upon the parties to it and, therefore, that it is suitable for enforcement.

## **B. The applicable rules to the recognition and enforcement of foreign arbitral awards**

Recognition and enforcement of foreign arbitral awards is basically governed by domestic laws. As these different national rules are very often unpredictable, it was deemed necessary to remove recognition and enforcement of foreign arbitral awards from the jurisdiction of domestic laws into a more international environment. This was also necessary given that certain countries do not have separate rules for the recognition and enforcement of foreign arbitral awards in their territories.<sup>107</sup> Rather, these countries apply the same rules to the enforcement of foreign arbitral awards as they do for the enforcement of foreign judgements. This approach has many disadvantages. For instance, it requires that an award must be enforceable in the country where it was made before it can be made enforceable in the country where execution is sought. Moreover, as a matter of 'reciprocity', the party requesting the enforcement must provide the court with the proof that a similar domestic award could be enforced in the country where the award was made, under conditions which are no more restrictive than those of the domestic law. Therefore, if enforcement in that country is deemed possible but under more strict

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<sup>106</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 448.

<sup>107</sup> For example: the Jordanian Law for Enforcement of Foreign awards. No. 8 of 1953.

conditions, then the request for enforcement shall be treated in the same manner in implementation of the reciprocity requirement.<sup>108</sup>

The disadvantages that result from the assimilation of foreign arbitral awards to foreign judgements explains why efforts have been made to improve this situation by means of international conventions or regional conventions providing for the recognition and enforcement of foreign arbitral awards.<sup>109</sup> This provides a much more developed and wide spread network system, better than any national provisions for the recognition and enforcement of arbitration awards. Also, such conventions help in establishing considerable uniformity in national laws governing the recognition and enforcement of international awards after being recognised as part of the state's domestic law, which ultimately leads to secure a considerable degree of uniformity in recognition and enforcement of arbitration awards between different states.<sup>110</sup>

The first of these conventions concerning recognition and enforcement of international arbitration awards was the 'Montevideo Convention' of 1889, a regional convention which provided for the recognition and enforcement of arbitration agreements between Latin American states.<sup>111</sup>

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<sup>108</sup> This was the situation under Articles 296-299 of the Egyptian rules of the Code of Civil and Commercial Procedures, Law No. 13/1968, if the applicability of the New York Convention or any other relevant treaty is not invoked. However, Law No 27 of 1994 has abandoned this requirement. See, Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 49.

<sup>109</sup> A. Nussbaum, "Treaties in Commercial Arbitration, A Test of International Private, Law Legislation", 56 *Harvard Law Review*, (1942), p. 219.

<sup>110</sup> Generally, the applicability of international conventions in a given state is regulated by provisions of law of that state, for example, in Egypt Art. 301 of the Code of Civil and Commercial Procedures of 1968 provides that: "The application of the rules stated in the above-mentioned articles dose not prejudice the applicability of the international treaties concluded or which will be concluded between the Republic (of Egypt) and other states in this respect"; also this was upheld by the Egyptian Court of Cassation in case No. 2994/1970 year 57, which concerns recognising an arbitral award under the New York Convention. Cited in, Nariman Abd al Khader, *The Arbitration Agreement*, Dar Al Nahdah Al Arabiah (1996), p. 147. (in Arabic).

<sup>111</sup> Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo, January 11, 1889, published in English translation in, "Register of Texts of

The first international convention in respect of enforcing foreign arbitral awards was the Geneva protocol on Arbitration Clauses, September 24, 1923.<sup>112</sup> It had two main objectives. The first was to ensure that arbitration clauses were enforceable internationally, the second was to ensure the enforcement of arbitral awards in the territory of the state in which they were made.

The Geneva Protocol was followed by the Geneva Convention on the Execution of Foreign Arbitral Awards, September 26, 1927.<sup>113</sup> The purpose of this convention was to widen the scope of the Geneva protocol awards within the territories of the contracting states.

The Geneva Treaties still deserve a place in the history of recognition and enforcement of international arbitration agreements and awards, but their field of application is limited as they only relate to awards made in the territory of a contracting state and those involving parties belonging to contracting states. Also, under the Geneva Convention, a party seeking enforcement had to prove the conditions necessary for enforcement, such as proving that the award is final. This creates the problem of 'double execution' - which will be explained later in this paper.<sup>114</sup>

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Conventions and other Instruments concerning International Trade Law, Volume II" (1973) *United Nations*, p. 5.

<sup>112</sup> Geneva Protocol on Arbitration Clauses, League of Nations Treaties Series (1924) Vol. XXVII p. 158, No. 678.

<sup>113</sup> Geneva Convention on the Execution of Foreign Awards of 1927.

<sup>114</sup> In order to show that the award had become final in its country of origin, the successful party was often obliged to seek a declaration in the courts of the country where the arbitration took place to the effect that the award was enforceable in that country, before it could be enforced in the courts of the place of enforcement. See Chapter Four, p. 171.

In addition to those international conventions there are a number of regional and bilateral conventions which may also have a significant bearing on the recognition and enforcement of foreign awards.<sup>115</sup>

The most important international treaty relating to international commercial arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. It therefore deserves close attention in order to understand how enforcement of international commercial arbitral awards can be achieved, as well as to find out what obstacles that may place in the way of the recognition and enforcement of foreign arbitral awards.

## **1. The New York Convention of 1958**

During the last four decades the New York Convention has played a very important role by making it possible for foreign arbitral awards to be easily enforced in most countries around the world. By rendering foreign awards enforceable with minimum court intervention in the countries that have acceded to it, the Convention has helped in

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<sup>115</sup> Mention could be made, in regard to the regional treaties between Arab countries, for example, the Inter-Arab Convention on the Enforcement of judgements and Awards, entered into by the states belonging to the Arab League on September 14, 1952; The Convention on Investment of Arab Capital, November 27, 1980; The Convention for Juridical Corporation Between States Belonging to the Arab League, Riyadh, April 4, 1983; The Amman Convention of 1987; for further information see, Jalili, "Amman Convention on Commercial Arbitration" (1990) 7, *Journal of International Arbitration*, p. 139. Other important conventions are the European Convention of 1961; the Inter-American 'Panama' Convention of 1975; the Moscow Convention of 1972.

establishing a deep confidence in the efficiency of arbitration throughout the international business community. This confidence was an essential element for its widespread use.<sup>116</sup>

The New York Convention made considerable improvements on the Geneva protocol and the Geneva Convention, since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign awards, and has been described as the single most important pillar on which the edifice of international arbitration rests.<sup>117</sup> The general level of success of the Convention may be seen as one of the factors responsible for the rapid development of international arbitration over recent decades as a preferred means for resolving international disputes.<sup>118</sup>

To achieve its objects, the text of the New York Convention places obligations on contracting states to recognise, as binding, arbitration agreement and awards.<sup>119</sup> In order to enforce arbitration agreements, the New York Convention adopts the technique found in the Geneva Protocol of 1923. In Article II (3) the New York Convention requires the contracting states to refuse to allow a dispute which is subject to an arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by any party to the arbitration agreement.

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<sup>116</sup> Jacques Werner, "The trade explosion and some likely effects on international arbitration", 12 *J.Int.Arb.*, (1995), p. 15. He states that: "The New York Convention should not be seen, as an intangible monument, but as a living mechanism, which can evolve in order to meet new needs of the international trading community."

<sup>117</sup> Wetter, "The present status of the International Court of arbitration of the ICC: appraisal", 1 *American review of International Arbitration* (1990), p. 91.

<sup>118</sup> The New York Convention has been ratified, acceded or succeeded to by over 120 countries. See the *ILA Report*, London Conference (2000), *op. cit.*, p. 2.

<sup>119</sup> Article II (1) of the New York Convention.

The Convention also replaces the requirement for a final award in the country of origin with the requirement of a binding award<sup>120</sup>, and agrees to recognise it even if it has been challenged in its country of origin.<sup>121</sup> Moreover, it simplifies the requirements for obtaining recognition of an award and puts the burden of proving the existence of negative grounds on the party opposing the application for its recognition.<sup>122</sup> It confirms the parties' freedom in the choice of the arbitral authority and of the arbitration procedure. It gives the authority before which the award is sought to be relied upon the right to order the party opposing the enforcement to give suitable security.<sup>123</sup> It further grants to the parties the right to apply either the Convention rules or other provisions, if more favourable, except for the 1923 protocol and the Geneva Convention (1927).<sup>124</sup>

The latter point may raise a question about the coexistence of different international conventions which are applicable to the enforcement of the arbitral award. A problem could arise, for example, if the Geneva Convention is applied to two states which have adhered to it, but only one of which is a member to the New York Convention. The relationship between those Conventions is regulated under Article VII (1) and (2) of the New York Convention, which provide that:

“1- The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting states nor deprive any interested party of any right he may have to avail himself of an award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

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<sup>120</sup> Article V (1)(e). Also see, Chapter Four, p. 171.

<sup>121</sup> Article VI of the New York Convention.

<sup>122</sup> Article V of the New York Convention.

<sup>123</sup> Article VI of the New York Convention.

<sup>124</sup> Article VII (2) of the New York Convention.

2- The Geneva protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards shall cease to produce effects between the contracting states on their becoming bound and to the extent they become bound by this Convention.”

However, the Geneva Treaties are still applicable when they are not excluded by the application of the New York Convention.<sup>125</sup> In any event, the Geneva Convention has a more limited scope than the New York Convention in as much as it concerns awards rendered only in the territory of a contracting state and involving parties belonging to contracting states, while the New York Convention has abandoned the nationality requirements and takes into account the place where the award is made.

The most significant achievement of the New York Convention is that it imposes on its signatories an obligation to limit the grounds upon which the enforcement of an arbitral award can be refused, to those set out in Article V paragraphs (1) and (2). This greatly facilitates enforcement in Convention states.

## **2. Grounds for refusing recognition and enforcement**

In order to be enforced according to the New York Convention, a foreign arbitral award must: (i) have resulted from a valid arbitration agreement<sup>126</sup>; (ii) comply with the applicable procedural law as agreed by the parties or the law in the country of origin<sup>127</sup>; (iii) have become binding in its state of origin<sup>128</sup>; (iv) concern a dispute which is

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<sup>125</sup> Van den Berg, *op. cit.*, p. 117; Rubino-Sammartano, M., *op. cit.*, p. 491.

<sup>126</sup> Article V (1)(a) of the New York Convention; also see, Article II (3).

<sup>127</sup> Article V (1)(b) and (d) of the New York Convention.

<sup>128</sup> Article V (1)(e) of the New York Convention.



arbitrable according the law of the country where enforcement is required<sup>129</sup>; and (v) its enforcement must not be in conflict with public policy.<sup>130</sup>

**a. Article V (1)**

Article V (1) sets out, in paragraphs (a) to (e), five grounds upon which enforcement of an arbitral award may be refused. Each of these grounds must be asserted and proven by the party seeking to rely upon it in resisting the enforcement of the award.<sup>131</sup>

The first ground concerns the parties' capacity and the validity of the arbitration agreement.<sup>132</sup> Under Article V (1)(a) the Convention specifies that enforcement of the award may be refused if the parties were under some incapacity, and provides that the capacity of the parties should be determined according to the law applicable to them, without specifying the applicable law.<sup>133</sup> Also, the second part of Article V (1)(a) indicates that the award could not be enforced if the agreement of the parties was not valid. The Convention here emphasises that the validity of the agreement should be determined according to the law "to which the parties have subjected it", which confirms

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<sup>129</sup> Article V (2)(a) of the New York Convention.

<sup>130</sup> Article V (2)(a) of the New York Convention.

<sup>131</sup> The burden of proving a ground for refusing enforcement is clearly placed on the party claiming under that ground. If he fails to discharge this burden, the other party will be permitted without further argument, to enforce the award. See Article V (1) of the New York Convention.

<sup>132</sup> Article V (1)(a) provides that: "The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

<sup>133</sup> Van den Berg, *op. cit.*, p. 276. He states that, the capacity of a natural person may depend on his nationality or on his place of usual residence. For corporations, it may depend on the place where the legal entity practises its business. The capacity of the parties, particularly when one of the parties is a state or a public body, requires many details which cannot be discussed in this research.

the principle of the “parties’ autonomy” where parties are free to designate the law applicable to the arbitration agreement. In the absence of such agreement, Article V (1)(a) provides that the validity of the agreement shall be decided according to the law of the country where the award was made.

The second ground concerns the denial of a fair hearing<sup>134</sup>, where a party can prove that he was not properly notified of the appointment of the arbitrators or of the arbitration procedures. In addition, the last part of Article V (1)(b) “or was otherwise unable to present his case” could be interpreted to include several procedural irregularities, and may vary from state to state. For example, this may include issues that concern the denial of a party of an equal opportunity to be heard, inequality of arms, or want of appropriate representation. Issues may also arise from the arbitral tribunal’s discretion to grant or refuse orders for production of documents, and from its right to rule on the admissibility of the evidence – whether from witnesses, experts, or documents – upon which the parties seek to rely. Such defects could also be raised under the public policy ground, for example on the ground of lack of procedural fairness, as will be explained later.<sup>135</sup>

The third ground concerns excess of authority or lack of jurisdiction.<sup>136</sup> This may occur if the arbitral tribunal has dealt with a dispute which does not fall within the scope

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<sup>134</sup> Article V (1)(b): “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

<sup>135</sup> The relationship between Article V (1)(c) and Article V (2)(b) will be explained in more depth in Chapter Five, p. 186.

<sup>136</sup> Article V (1)(c): “The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration

of the arbitral clause, or if the arbitral tribunal has given decisions on matters which are beyond or outside the question submitted by the parties.<sup>137</sup> This ground does not concern the case where the arbitrator had no competence at all because of lack of a valid arbitration agreement as the latter situation should be determined under Article V (1)(a), which concerns the validity of the arbitration agreement. The second part of Article V (1)(c) provides for the possibility of isolating that part of the award which contains the decision that has been made within the arbitrator's authority and enforce that part of the award, while refusing to enforce that part of the decision which falls outside of the arbitrator's authority.<sup>138</sup>

The fourth ground concerns procedural irregularities arising from the composition of the arbitral tribunal or from the arbitral procedures.<sup>139</sup> Article V (1)(d) provides that determining the validity of an arbitral award should be established upon the compliance of the arbitral procedures with the parties' agreement, or, failing such agreement, according to the law of the country in which the arbitration took place. One should recognise here that Article V (1)(d) asserts the role of the parties' autonomy in deciding the rules that will govern the arbitration proceedings. It has been reported that the drafters of the Convention preferred to rely on the parties' agreement in order to decide on the irregularity of the composition of the arbitral tribunal and the arbitral procedure,

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can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced."

<sup>137</sup> For Example, if the tribunal has awarded more than, or differently from, what was claimed by the parties. See Van den Berg, *op. cit.*, p. 314.

<sup>138</sup> See Van den Berg, *op. cit.*, p. 318.

<sup>139</sup> Article V (1)(d): "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

providing that the law of the country in which the arbitration took place can be relied upon only where the parties had not agreed on these matters.<sup>140</sup>

The fifth ground concerns the binding effect of the arbitral award. Enforcement of the award may be refused if the party against whom the award is invoked proves to the court that the award is not yet binding, or has been set aside or suspended by a competent authority in the country of its origin.<sup>141</sup> The extent of the binding nature of an award is still subject to a wide debate<sup>142</sup>, although Article V (1)(e) indicates that the time at which an award can be considered as binding should be determined according to the law of the country where the award was made or the law under which the award was made. It will be important for this study to examine whether or not a court can enforce an award despite its having been set aside in the country of origin. The question arises where the court of enforcement finds that the award was set aside in the country of origin for considerations of public policy which relate only to the national law of the country of origin, and that the same issue does not violate public policy in the country of enforcement.<sup>143</sup>

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<sup>140</sup> Van den Berg, *op. cit.*, p. 323.

<sup>141</sup> Art V (1)(e): "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

<sup>142</sup> It is submitted that, the New York Convention regards the binding effect of the arbitral award in a quite different way from the Geneva Convention 1927. Under the latter, to enforce an award in other states, it had to be no longer capable of being challenged in the state of origin. See, Article 1 (2)(b) of the Geneva Convention of 1927 which amounted to the system of the so-called "double exequatur". See, Van den Berg, *op. cit.*, p. 333.; see ahead, Chapter Four, p. 171.

<sup>143</sup> See, Chapter Four, at p. 174.

## **b. Article V (2)**

Article V (2) may be raised, on its own motion, by the court requested to enforce the award.<sup>144</sup> The Article refers to the ‘competent authority’ as having the right to raise the objection, since it includes issues that concern public policy. However, the party against whom the award is invoked may also challenge the enforcement of the award upon this ground. This is due to the character of public policy as a notion which relates to both the interest of the public and the interest of the parties, therefore the right to raise such ground must not be confined to a specific authority. Also, as will be explained in the following chapters, this is due to the inevitable connection between Article V (2)(b) and the rest of the grounds which have been mentioned in Article V (1).

### **i. The relationship between arbitrability and public policy**

Article V (2) comprises two grounds. The first concerns the non-arbitrability of the dispute under the law of the state requested to enforce the award<sup>145</sup>, and the second concerns public policy.<sup>146</sup> It has been argued that the two grounds are actually two sides of the same coin, as some writers consider mentioning arbitrability separately from public policy as merely ‘superfluous’.<sup>147</sup> However, other writers do not consider arbitrability as

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<sup>144</sup> Article V (2): “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ...”

<sup>145</sup> Article V (2)(a); “The subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

<sup>146</sup> Article V (2)(b): “The recognition or enforcement of the award would be contrary to the public policy of that country.”

<sup>147</sup> It has been reported that the distinction has been kept for historical reasons since the distinction was mentioned in the Geneva Convention of 1927 and was kept by the New York Convention without discussion in spite of an objection raised by the French delegate, see UN

necessarily identical with public policy rules.<sup>148</sup> The latter view could arguably be true, especially if we take into consideration that there are several points that distinguish arbitrability from public policy.

Firstly, arbitrability concerns certain fields of law or kinds of disputes which by their subject matter are reserved for state courts. For example, the legislators in a given country may wish to prohibit arbitration for certain categories of disputes, such as certain anti-trust matters. Therefore, arbitrability is mainly a question of which issues arbitrators are not competent to settle. The same issues which are deemed to be not arbitrable, may often quite properly be litigated before the courts. Accordingly, questions that are not-arbitrable do not necessarily themselves constitute a violation of public policy.

Secondly, one can examine the notion of arbitrability by answering the question of what can be arbitrated.<sup>149</sup> Therefore, arbitrability only relates to the subject matter of the dispute, whereas public policy covers a wide range of issues, relating both to the subject matter of the dispute and to procedural irregularities. Accordingly, public policy is a wide concept which includes the concept of arbitrability.

The importance of arbitrability, as part of public policy, will appear later in this research when dealing with public policy issues relating to the substance of the dispute as a ground to refuse the enforcement of foreign arbitral awards under Article V (2)(b).<sup>150</sup>

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Doc. E/CONF. 26/ SR.11; see Van den Berg, *op. cit.*, p. 360; P. Sanders, "The New York Convention", *International Commercial Arbitration* Vol. II, The Hague 1960, 293, 323.

<sup>148</sup> Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," International Council for Commercial Arbitration public policy in arbitration (ICCA) New York Arbitration Congress, Pieter Sanders ed., (1986), p. 183.

<sup>149</sup> *Ibid.*, p. 181.

<sup>150</sup> See Chapter Six, p. 239.

## ii. Article V (2)(b), public policy

Article V (2)(b) states that recognition and enforcement of an arbitral award may be refused if it would be “contrary to the public policy of that country”. It is believed that including this ground in the New York Convention was inevitable, since public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and foreign judgements.<sup>151</sup> Also, it has been reported that providing this ground as it is in a simple formulation was intentional by the drafters of the Convention, in order to induce the prospective members to enter into the Convention and adopt its provisions without fear of being deprived of jurisdiction and supremacy over foreign arbitral awards.<sup>152</sup>

One should also recognise the main object of Article V (2)(b) in protecting the vital interests of the states which become member to the Convention. Such interests could be moral, political, social or economic. However, the simple formulation of Article V (2)(b) has led some writers to consider Article V (2)(b) as the greatest single threat to the use of arbitration in international commercial disputes, since the background of Article V (2)(b) does not provide a clear illustration of how it should be applied.<sup>153</sup> In its report to the UN Conference, the United Nations committee that prepared the draft convention indicated

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<sup>151</sup> Van den Berg, *op. cit.*, p. 360.

<sup>152</sup> See, Gerald Aksen, “United States Implements United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 3 *Southwestern University Law Review* (1971), p. 13.

<sup>153</sup> Richard A. Cole, *op. cit.*, p. 373. He describes Article V (2)(b) as a loophole, he states that: “Courts and commentators alike have worried that the expansion of this loophole could negate the effectiveness of the Convention. Yet, it appears that while the defense is often raised, it is rarely successful”; P. Sanders, “A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 13 *Int.Law.*, (1979), p. 269-270; see the ILA Report, London Conference (2000), *op. cit.*, p. 35. The report provides that public policy exception would undermine the objectives of the Convention; Hakan Berglin, “The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 4:2 *Dickinson Journal of International Law* (1986), p. 167 at 168; *Parsons and Whittemore Overseas Co. Inc. v Societe Generale du l’Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 at p. 975 (U.S. no. 7).



its intention to limit the application of public policy “to cases in which the recognition or enforcement of a foreign arbitral award would be contrary to the basic principles of the legal system of the country where enforcement of the award is invoked”.<sup>154</sup> Working Party No. 3 proposed to limit this ground by referring to the term “public policy” alone, and this limitation was accepted by the Conference, rejecting by that a proposal by Brazil which referred to “fundamental principles of law”.<sup>155</sup> Thus, it is apparent that the drafters of the New York Convention did not seek to harmonise public policy or to establish a common international standard. The drafters of Article V (2)(b) deliberately kept the formula as simple as possible in order to persuade all the states to become members to the New York Convention, and this has been considered as providing an “escape clause which was necessary for ratification of the Convention by the member states.”<sup>156</sup>

The conclusion which can be drawn from this background is that public policy is a ground to refuse the enforcement of foreign arbitral awards which may be raised by either party or by the court where enforcement is sought. The historical background of Article V (2)(b) shows that there have been several attempts to limit the scope of applying this ground to international public policy, but that these were merely recommendations<sup>157</sup>, and that the exact scope of how this ground should be applied was not clearly identified in the New York Convention. The absence of a legislative text, which defines and enumerates those matters that can be considered as public policy issues, leaves the door

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<sup>154</sup> The U.N. ESCOR. Report of the Committee on the Enforcement of International Arbitral Awards, U.N. Doc. E/2704 and Corr. 1. E/AC.42/4/Rev. 1 (1955); Richard A. Cole, *op. cit.*, p. 373, footnote 46.

<sup>155</sup> UN DOC E/CONF.26/SR.17; J. D. Bredin, “The New York Convention of June 10th 1958 for the Recognition and Enforcement of Foreign Arbitral Awards,” 87 *Journal du Droit International* (1960) p. 1003 at p. 1027; Van den Berg, *op. cit.*, p. 361.

<sup>156</sup> Barry, “Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal,” 51 *TEMPLE L. Q.* 832. 839 (1978); Richard A. Cole, *op. cit.*, p. 374, footnote (50); Van den Berg, *op. cit.*, p. 366.

<sup>157</sup> See the Statement of the Chairman of Working Party No. 3, UN DOC E/CONF. 26/SR.17. He provides that: “the provision should not be given a broad scope of interpretation.”

widely open for domestic courts to determine the extent of those matters which are deemed contrary to public policy according to their notion of the concept.<sup>158</sup> This may undermine the objects of Article V of the New York Convention, as giving the national courts such discretionary power may expose the award to additional conditions other than the limited grounds provided under article V (1).

As will be seen through this study, the extent of public policy is subject to a variety of interpretations by the courts of different nations. The questions that need to be settled will be whether it is possible to achieve a comprehensive definition of this concept, especially in cases concerning the enforcement of foreign arbitral awards, and whether it is conceivable to find acceptance of the notion of international public policy?<sup>159</sup>

There are many issues that still need to be addressed in this regard. The following chapters will examine the general content of public policy. A distinction will also be drawn between the public policy test in purely national affairs and the public policy test to be applied in international agreements as understanding the concept of international public policy would restrict judicial interference with international arbitral awards to a minimum.

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<sup>158</sup> Gerald Aksen, *op. cit.*, p. 13. He states that: "The applicability of Article V (2)(b) has been left to the good faith of the contracting countries."

<sup>159</sup> However, it is impossible to provide a conclusive definition of public policy, but I believe that there must be a concept that may give general indications as to the ideas underling the international arbitration public policy. If a workable definition of international public policy could be found, it would be an effective way to protect foreign arbitral awards in an international arbitration from being set aside for purely domestic considerations.

## **CHAPTER TWO**

### **THE NOTION OF PUBLIC POLICY AND ITS ROLE IN INTERNATIONAL COMMERCIAL ARBITRATION**

## **Chapter Two**

### **The Notion of Public Policy and its Role in International Commercial Arbitration**

Public policy as a notion affects the enforcement of foreign arbitral awards in various ways, as the application of this notion may occur at different stages of the arbitration process. Initially the arbitral tribunal may find that it is imperative to apply public policy rules that might have a considerable consequence on the validity of their verdict.<sup>1</sup> Secondly the court in the country of origin, which has jurisdiction over the arbitration process, may refuse to assist the arbitration process or to recognise the validity of the arbitration agreement and the resulting award if it considers that the award violates its national public policy rules.<sup>2</sup> Finally if the award was considered as a foreign award, then the court where the enforcement is taking place may not recognise or enforce the award if it contradicts with public policy as conceived in that state.<sup>3</sup>

The final stage has a special significance. This is due to the nature of foreign arbitral awards in that they were rendered outside the scope of the states' supervision and therefore, courts may reinvestigate the validity of an arbitral award according to its conformity with the mandatory rules in the state of enforcement. This may expose the award to a wide range of possible grounds on which the award will be nullified and set aside.

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<sup>1</sup> It is a common thing to find public policy rules which cannot be contracted out of by the parties or which cannot be disregarded by the arbitrators. See, Chapter Three, p. 101.

<sup>2</sup> See Chapter Four, p. 151.

<sup>3</sup> See Chapter Five, p. 184; Chapter Six, p. 239.

In this chapter, the study will firstly focus on the concept of public policy. Secondly the focus will be upon the traditional classification of public policy rules, both domestic and international, which deserves a careful analysis. Therefore, a distinction between the different forms of public policy will be drawn to illustrate the different applicable public policy rules to relationships that involve a foreign element. Finally, we will examine the development of the concept of international public policy, and the approach towards accepting the existence of international public policy rules, as distinct from domestic public policy rules.

## **I. The Notion of Public Policy**

There are different terms used to give expression to this notion. The term public policy is used in the common law system<sup>4</sup>, whereas the civil law system uses the French term *ordre public*.<sup>5</sup> When analysing the two terms one may recognise that the word *public* is mutual. It generally implies reference to the majority of a particular community. The other two words, policy and *ordre* are different, although they could arguably have a similar interpretation. The two terms may indicate that there are fundamental interests or essential values significantly important to the community, the public, which should be protected at all times. Many scholars distinguish between public policy and *ordre public*,

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<sup>4</sup> For example, in England, the Arbitration Act 1996 uses the term public policy in Section 68(2)(g) and Section (103)(3).

<sup>5</sup> For example, the literal translation of Article 53(2) of the Egyptian Law No. 27 of 1994, indicates that the Arabic text refers to '*order public*'.

as the latter has a wider application than the common law term public policy.<sup>6</sup> However, the general trend in international commercial arbitration is to use the two terms interchangeably as they ultimately lead to the same meaning, and therefore they will be used interchangeably in this study.<sup>7</sup>

The rules that reflect the public policy interests mark the boundary line between those conducts which are permissible in a given community and those which are not. In the domain of contractual relations, public policy controls the will of the parties and supervises the limits of their autonomy, which may lead to nullify any agreement that violates public policy in order to protect the community from any injurious agreements.<sup>8</sup>

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<sup>6</sup> Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, Oceana Publications, Inc., Dobbs Ferry, N.Y, (1978), p. 401. He states that: "the Civil Law term '*ordre public*' is generally given a wider application than the Common Law term 'Public Policy'"; ILA *Report*, London Conference (2000), *op. cit.*, p. 10. It provides that: "... public policy, as understood in Common Law jurisdictions, might not cover all cases of procedural injustice"; Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," *op. cit.*, p. 179; Nadelmann and Von Mehren, "Equivalencies in Treaties in the Conflicts Field," 15 *AM. J. Comp. L.* 195, 200 (1967); Richard A. Cole, *op. cit.*, p. 375; Christopher B. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention," 71 *J.Int.Arb.* (1990), p. 71 at 72; Howard M. Holtzmann & Joseph E. Neuhaus, *op. cit.*, p. 911.

<sup>7</sup> The same concept has been recognised in *Lemenda Ltd. v. African Middle East Co.* [1988] (Q.B.D.) 453, where Phillips J., referred to 'order public' in the Qatar Civil law. Phillips J stated that: "The reference in these articles to '*public order*' is the equivalent of the more familiar English term public policy"; also see, Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," *op. cit.*, p. 179; Van den Berg, *op. cit.*, p. 359 He states that: "... as both terms are frequently used interchangeably, the term 'public policy' will be used with the understanding that it has the same meaning as the term 'order public'."

<sup>8</sup> Hartwell Geoffrey illustrated the existence of certain categories of conducts that a community may not allow, and therefore are prohibited by public policy rules. He provides that: "Societies may decide that certain pacts should not exist, or that, if they are allowed to exist, it will not support them. Law will give effect to such matters of social or political policy. Thus, there are, in the various jurisdictions of the world, pacts that the state will allow to exist but will not enforce (gambling arrangements, for example) pacts that can be destroyed by intervention of the state (violable contracts) pacts that are not permitted in law to exist at all and the extreme category of pacts the formation of which is, of itself, an offence against the state." Geoffrey Beresford

## A. Definition of public policy

The notion of public policy is, in itself, ambiguous and therefore there is no definitive identification of this notion. Accordingly different national courts may vary in their decisions on matters that involve consideration of public policy.

Parke B. in *Egerton v. Brownlow*<sup>9</sup> stated that this ambiguity leads the court to confusion and uncertainty:

“Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean ‘political expedience’, or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion.”

Lord Davey described this ambiguity as:<sup>10</sup>

“... a treacherous ground for legal decision...a very unstable and dangerous foundation on which to build until made safe by a decision.”

Kekewich, J. mentioned in *Davies v. Davies*<sup>11</sup>, the famous decision of Mr Justice Burrough J. in *Richardson v. Mellish*.<sup>12</sup> Kekewich, J. stated that:

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Hartwell, “The New York Convention of 1958: A Basis for a Supra National Code,” *Internet address*:  
([http://www.hartwell.demon.co.uk/nyc\\_asa.htm](http://www.hartwell.demon.co.uk/nyc_asa.htm)) at p. 1.

<sup>9</sup> *Egerton v. Brownlow*, (1853) 4 H. L. C. 1, p.123; also see, *Fender v. ST. John-Mildmay*. (1938) A.C., p. 10.

<sup>10</sup> *Janson v. Driefontein Consolidated Mines Ltd* (1902) A.C. 484, 500, p. 507; also see, *Janson v. Mines* (1902) A. C. 484, 491, 497.

<sup>11</sup> *Davies v. Davies*, (1887) Ch. D. 36., p.364.

<sup>12</sup> *Richardson v. Mellish* (1824) 2 Bing. 228; [1824-34] All ER Rep. 258.



“I cannot but regard the jarring opinions as exemplifying the well-known dictum of Mr. Justice Burrough in *Richardson v. Mellish*, that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you”, public policy does not admit of definition and is not easily explained”.

However, Lord Denning in *Enderby Town Football Club Ltd. v. The Football Association Ltd*<sup>13</sup> showed a more optimistic view of this notion:

“With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.”

Notwithstanding these difficulties various definitions have been formulated.

Mark A. Buchanan stated that:<sup>14</sup>

“Domestic public policy represents those local standards or rules that are not subject to alternation or derogation by the parties and stand as an outside limit to the parties freedom to contract.”

Ashraf Al Rifaie<sup>15</sup> displayed several definitions contained in Arabic and French doctrines<sup>16</sup>, including those of the French writer, Philippe Malaurie.<sup>17</sup> These included almost twenty definitions of public policy given by several authors, leading to the

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<sup>13</sup> *Enderby Town Football Club Ltd. v. The Football Association Ltd.* (1971) Ch. 591, 606.

<sup>14</sup> Mark A. Buchanan, “Public Policy and International Commercial Arbitration,” 26 *AM. Bus. L.J.*, (1988), p. 513; also see, John Y. Gotanda, “Awarding Punitive Damages in International Commercial Arbitration,” 38 *Harv. Int.L.J.* 1, 1997, p. 102.

<sup>15</sup> Ashraf Al Rifaie, *op. cit.*, p 11.

<sup>16</sup> Also see, Abdul Hamid El Ahdab, “General Introduction on Arbitration in Arab Countries,” *Int. Handbook on Comm. Arb.*, (1993), p. 12. He defines the concept of public policy according to Moslem Law as: “[it] is based on the respect of the general spirit of the *Shari’a* and its sources (the Koran and the *Sunna*, etc.) and on the principle that individuals must respect their clauses, unless they forbid what is authorised and authorise what is forbidden.”

<sup>17</sup> Philippe Malaurie: *Les Contrats a L’order Public*, Thesis, Paris, 1953, p. 69. Cited in Ashraf Al Rifaie, *op. cit.*, p 16.

conclusion that none of these definitions can give an accurate identification for this notion. Ashraf Al Rifaie then defines public policy as:<sup>18</sup>

“The body of rules that intends to protect the political, economic and moral standards of a state, by giving public interests the priority over private interests, without disregarding the private rights entirely.”

Julian Lew initially observes that a totally comprehensive definition of public policy has never been proffered. However, he then goes on to state that:<sup>19</sup>

“It is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.”

In the context of enforcement of an arbitral award, the English Court of Appeal in *D.S.T. v Rakoih* (1987) Sir John Donaldson MR stated that:<sup>20</sup>

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable

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<sup>18</sup> *Ibid.*, p 12. Likewise, the Egyptian courts provided a general definition for public policy. The Egyptian Court of Cassation defined public policy as: “... the rules that intends to fulfil the high interests of the state, whether it is political, moral, social or economical, and relates with the substantial and moral status of the community, where public interests has a prominence upon privet interests.” Egyptian Court of Cassation, 17 of January 1979, Publication of Cassation Court decisions; also see, Abid al Razag al Sanhuri, *Illustration of the Civil Law*, 2ed, Dar al Nahdah al Arabiah (1964), p. 399. (in Arabic); Hussam-al Dean Fathi Nasif, *National Law of the Judge and Deciding Private International Law Disputes*, Dar al Nahdah al Arabia (1994), p. 459. (in Arabic) He defines public policy rules as: “the selected mandatory rules which cannot be disregarded by the agreement of individuals.”

<sup>19</sup> Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, *op. cit.*, p. 532; also see, *Egerton v. Brownlow* (1853) 4 HLC 1. The House of Lords described public policy as: “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good”; see Cheshire and North, *Private International Law* (13<sup>th</sup> ed., Butterworths, 1999), p. 123, referring to “some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception.”

<sup>20</sup> *Deutsche Schachtbau-und tiefbohrergesellschaft mbh v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep. 246 at 254.

and fully informed member of the public on whose behalf the powers of the state are exercised.”

Accordingly, public policy rules play an important role in protecting the substantial rights and principles of the community, primarily because these principles have a political, moral, economic or social importance or because of any other public goals which relate to the justice and morality as conceived in a given community.<sup>21</sup> The rules that contain these rights are mandatory and should prevail over any other provision or rule.

All of the above then begs the following questions: what can be considered as a public policy rule in a given community? How can a court distinguish between public policy rules and other legal rules? How could a court decide that a specific rule has an important value for the public? In other words, are these public policy rules situated and identified in provisions of law, where a court can easily locate them and apply them accordingly?

It must first be considered whether there are rules of law that have a significant importance and are mandatory in their application. These are the mandatory rules, which exist in both statutory provisions and in common law rules.<sup>22</sup> It is necessary in this

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<sup>21</sup> Public policy in this context represents the interest of the community and therefore must be distinguished from the policy of a particular government. See *Egerton v. Earl Brownlow* (1853) 4 H. L. C. 1, 148; 23 L. J. (Ch.) 348, per Lord Truro; *Monkland v Jack Barclay Ltd* (1951) 2 KB 252; (1951) 1 All ER 714; *Regazzoni v. KG Sethia* [1958] A.C. 301; [1957] 3 All E.R. 286; also see, Halsbury's Law of England, 4<sup>th</sup> ed., Lord Mackay of Clashfern, Butterworths, (1973), p. 844.

<sup>22</sup> See William Holdsworth, *History of English Law*, 3ed., London: Methuen, (1922), p. 55. He states that: "... in fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them"; also see, Chitty on Contracts, The Common Law Library, Number 1. Twenty Sixth Ed. 1989. Vol. 1. p. 685.

respect to examine the extent of the obligatory force of such mandatory rules. A mandatory rule could be restrictively fundamental to the public, and thus any agreement that violates such a rule will be considered as offensive to the policy of a given community and therefore must be void. Conversely, not every mandatory rule always constitutes fundamental principles as not every mandatory rule contains an essential value to the community. In this respect, it is necessary to decide when a mandatory rule forms part of public policy rules which represent the fundamental interests in a given community.<sup>23</sup> To achieve this balance, an illustration of mandatory rules should take place in order to understand their limits and to be able to distinguish mandatory rules from public policy rules that embody the fundamental issues.

## **B. Mandatory rules and public policy**

Mandatory rules are known as such, in the domain of statutory framework, to distinguish between the obligatory rules, which parties cannot derogate from by their agreement, and other rules, which are discretionary. The latter are known in civil law systems as supplementary, complementary or directory rules.<sup>24</sup> Supplementary rules are

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<sup>23</sup> It has been reported in Chitty on Contracts that the scope of public policy could be classified into five groups: "Firstly, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest." The Common Law Library, Number 1. Chitty on Contracts, *op. cit.*, para. 1134, p. 686. However, it has been added that this classification is not perfect; "This classification is adopted primarily for ease of exposition. Certain cases do not fit clearly into any of these five categories." *Ibid.*, para. 1134, p. 686.

<sup>24</sup> Abid al Hakeem Foudah, *Nullification in Civil Law and Private Rules*, Dar al Matboat al Gam'iah, (1993), p. 27. (in Arabic).

applicable whenever the parties neglect or do not organise some of the contractual conditions of their agreements. Supplementary rules thus complete the parties' consent if their consent was ambiguous or incomplete, with the priority given to the parties' consent, excluding what might contradict with the public policy. On the other hand, mandatory rules are applicable at all times and have priority over the parties' consent. Their function is to control the parties' autonomy, under the penalty of nullification of any agreement that violates or contradicts with such mandatory rules.

Usually neither provisions nor statutes contain separate lists for mandatory rules and for supplementary rules, but rather the distinction between the two types can be drawn from the way that they have been formulated. Mandatory rules always have an obligatory formula, providing an order to do or to forbid certain actions.<sup>25</sup> The reason why these mandatory rules have such obligatory force is due to the importance of the interests that these rules are designed to protect, which explains why mandatory rules are usually mixed with public policy rules.<sup>26</sup> Okezie Chukwumerije<sup>27</sup> referred to the relationship between the concept of public policy and mandatory rules. He provided that mandatory rules embody the concept of public policy:

“...there is a close relationship between the concept of public policy and that of mandatory rules. Mandatory rules would include those aspects of public policy and rules

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<sup>25</sup> Abid al Hakeem Foudah, *op. cit.*, p. 27.

<sup>26</sup> Professor Mayer described mandatory rules as: “... a mandatory rule (*loi de police*) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy (*ordre public*), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.” P. Mayer, “Mandatory Rules of Law in International Arbitration.” (1986) 2 *Arbitration International*, p. 274 at 275.

<sup>27</sup> Okezie Chukwumerije, *op. cit.*, p. 180.

of national law that are couched in an imperative manner because they embody the vital socio-economic policies of the state involved. These include currency and exchange regulations, boycotts and blockades, embargoes, and environmental protection laws.”

One should consider however, that mandatory rules have a broader application than public policy and that “every public policy rule is mandatory, but not every mandatory rule forms part of public policy”.<sup>28</sup> This can be recognised for example, in procedural rules, where several procedural rules are deemed mandatory although they do not form part of the public policy of the state.<sup>29</sup> Therefore the importance of the interests which such rules aim to protect should be established, owing to the fact that public policy embodies the most essential and fundamental interests in the community.<sup>30</sup>

Due to the ever-changing and developing nature of communities, and our understanding of what the term community represents it is entirely understandable that what is deemed appropriate for one community may not be appropriate to other

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<sup>28</sup> See, *ILA Report*, London Conference (2000), *op. cit.*, p. 18.

<sup>29</sup> Karl-Heinz Bockstiegel, “Public Policy and Arbitrability,” *op. cit.*, p. 177 at 183. He states that: “mandatory rules are not necessarily identical with public policy rules. Public policy requires further additional qualifications.”

<sup>30</sup> See, *Fender v. ST. John-Mildmay*, 1938, A.C. 1. This case is one of the cases where the notion of public policy was carefully analysed and illustrated; Lord Thankerton, in page 22, states that: “One of the constant principles of public policy in this country, which it is the duty of the Courts to maintain, is that of freedom of contract; but it is certain that there are some classes of contract, whose characteristics are such that their enforcement by the Courts is barred by a paramount principle of public policy. Generally, it may be stated that such prohibition is imposed in the interest of the safety of the State, or the economic or social well being of the State and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.”



communities.<sup>31</sup> This explains why public policy is a changeable notion<sup>32</sup>, changing from place to place and from time to time.<sup>33</sup>

### C. Public policy is a relative concept

Public policy rules vary according to that which the respective states may consider as fundamental.<sup>34</sup> By virtue of the fact that public policy represents the fundamental standards in a given community, such standards could only be applicable in the place in

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<sup>31</sup> In *Davies v. Davies* Kekewich, J. stated that: "one thing I take to be clear, and it is this - that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public." *Davies v. Davies*, [1986] 1 F.L.R. 497; Ch. D. 36.1887, at p. 364.

<sup>32</sup> See, Chitty on Contracts, *op. cit.*, para. 1133, p. 685, "public policy is not immutable. ... Rules which rest on the foundation of public policy, not being rules which belong to the fixed customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce." See *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (1893) 1 Ch. 630, 666; *Multiservice Bookbinding Ltd. v. Marden* (1979) Ch.D. 84. And vice-versa, a practice which was once permissible maybe prescribed. See, *Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport) Ltd.* (1968) A.C. 269, 322-324, 333.

<sup>33</sup> Even in the same country, what can be permissible in one time may become illegal in other time. See, *Davies v. Davies*, *op. cit.*, p. 397, Kekewich, J. provides that: "contracts which at one time were deemed - and I dare say justly deemed - to be contrary to public policy, at another time have been deemed to be consistent with public policy, and for the public benefit." For example, it was provided that in the nineteenth century Christianity was part of the law of England and that, accordingly, a contract to hire a hall for meeting to promote atheism was contrary to public policy but fifty years later this view was decisively rejected. See *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition co.* (1894) AC 535, per Lord Watson p 553; Cheshire Fifoot & Furmston, Law of Contract 7<sup>th</sup> N. Z ed., p. 311; *Bowman v. Secular Society* (1917) Ac 406; Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," *op. cit.*, p. 180. He states that: "national public policies have changed over the years, influenced by a number of factors such as national developments in the political and legal system the involvement of the national economy in international trade, political decisions such as the promotion of foreign investment, or international developments."

<sup>34</sup> See, Van den Berg, *op. cit.*, p. 360. He provides that: "the reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various states"; also see, Halsbury's Law of England, 4<sup>th</sup> ed., *op. cit.*, para 842; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p.443, stating that: "the concept of



which they were made. Accordingly, if a public policy rule of a given state, was referred to or raised with the intention of application in another state, and was contrary to the public policy rules of the latter, 'host' state, then the application of this rule would not be granted.<sup>35</sup> Lord Kingsmill Moore J. clearly expressed this view in *Peter Buchanan LD. and Macharg v. Mcvey*:<sup>36</sup>

"In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered "the proper law" of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another."

Importantly, what could be termed a 'conflict of international public policy rules' will take place in deciding which public policy rules are to be applied in private international law relations. According to the traditional conflict of law theory, it has long been accepted that such circumstances are subject to the qualification that imperative laws of the forum may apply to a contract irrespective of the proper law of the contract.<sup>37</sup>

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public policy (or order public, in the civil law terminology) is general; but the actual requirements of public policy vary from one state to another."

<sup>35</sup> Yves Derains, "Public Policy and the law Applicable to the Dispute in International Arbitration," International Council for Commercial Arbitration (ICCA) New York Arbitration Congress (1986), Pieter Sanders ed., pp. 227-228. He explained that: "In domestic law, public policy forms a set of rules that parties may not contract out of. In private international law, public policy known as 'international public policy' enables the judge to exclude the foreign law that would otherwise be applicable when it infringes on social or legal concepts considered to be essential in his legal system. In this connection it is known as overriding public policy"; to the same extent this has been explained by the Egyptian doctrines, see Ashraf al Rifaie, *op. cit.*, p. 23; Ahmad Abid al Khreem Salamah, *Summary in Private International Relations*, 1 Ed, Dar al Nahdah al Arabiah, p. 225. (in Arabic); Article 28 of the Egyptian Civil Law.

<sup>36</sup> *Peter Buchanan LD. and Macharg v. Mcvey*. [1955] A.C. 516 at p. 528.

<sup>37</sup> Hussam-al Dean Fathi Nasif, *op. cit.*, p. 454. He considers public policy in international private law as having an exclusion role which protect the community from foreign rules that may contradict with its system, he also describes the conflict of law rule, when it refers to apply a

Therefore, applying foreign laws in a given state will be determined according to its harmony with the public policy rules of that state. This opinion was given by Lord Justice Clerk Patton in *Connal & Co. v. Loder*:<sup>38</sup>

“Everybody knows that the fundamental principle upon which we introduce foreign law affecting the rights of contracts or otherwise, is only to the effect of introducing such law when it is not in direct contradiction to the principle upon which our law is governed.”

The following material explains the conflict of public policy rules, and the distinction between national public policy and international public policy.

## II. The Conflict of Public Policy Rules

To understand the meaning of the conflict of public policy rules one should distinguish between the traditional conflict of laws, as it is known in private international law<sup>39</sup>, and the conflict of public policy rules. Simply, a difference between the two concepts is that the conflict of public policy rules occurs after deciding the applicable law, illustrated in the following hypothetical example. A dispute arose in which different international elements were involved. If the parties did not agree on the applicable law,

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foreign legal system, as a step to the uncertainty which justifies the intervention of public policy in private international law; also see, Hisham Sadik, *Conflict of Laws*, Monsha'at al Ma'arif, Alexandria (1993), p. 29, (in Arabic); Okezie Chukwumerije, *op. cit.*, p. 180.

<sup>38</sup> *Connal & Co. v. Loder* (1868), 6 M. 1095; also see, Okezie Chukwumerije, *op. cit.*, p. 181.

<sup>39</sup> J. G. Collier, *Conflict of Law*. 2nd ed., Cambridge University (1987), p. 3. He defines the English conflict of law rules as: “a body of rules whose purpose is to assist an English court in deciding a foreign element.”; also see, Pierre Lalive, “Transnational (or Truly International) Public Policy ..” *op. cit.*, p. 260. He defines private international law as: “... a branch of the law which is based on a fundamental distinction between ‘domestic’ situation and ‘international’ situations (i.e., those which include one or more foreign elements sufficiently relevant to call for a particular treatment and the intervention of the private international law of the State.).”

the court that had jurisdiction to adjudicate such a dispute would decide the applicable law according to the conflict of law rules or that which it may find as an appropriate or proper law to be applied to the dispute.<sup>40</sup> The hitherto chosen applicable law, in accordance with the conflict of law rules, may include what could be deemed a violation of the public policy of the forum or the public policy of a third country. In other words, a conflict of public policy rules indicates that a relationship involving two different public policy rules, each of which belongs to a different legal system, should be determined by the courts or arbitral tribunals by choosing the applicable public policy rules, favouring one over the other.

The problem that arises from the conflict of public policy rules can be viewed from the perspective of the role of public policy in private international law. Generally, when a private international law rule permits the application of a foreign law rule, it does not give a green light to apply the foreign law regardless of the effect of applying that law in the state.<sup>41</sup> Public policy here intervenes in order to exclude the application of the foreign rule that the 'choice of law rules' refers to as having jurisdiction to be applied.<sup>42</sup>

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<sup>40</sup> There are different factors that have to be taken into consideration in this respect; the nature of the dispute that it involves international relationships, the will of the parties that they can choose the applicable procedural and substantive law; and finally, the involvement of different laws, where different laws may relate to the case which poses a foreign element. For the question of who decides the applicable law in international commercial arbitration, see Chapter Three, at p. 104.

<sup>41</sup> See for example, Article 28 of the Egyptian Civil Law, it provides that: "The provisions of a foreign law determined by virtue of the preceding provisions shall not be applicable if those provisions contravene the public order or morality in Egypt."

<sup>42</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 262.

To decide the applicable public policy rules in private international law relations, it is necessary, first of all, to distinguish between the role of public policy in domestic and private international law relations, drawing attention to the trend towards the development of international public policy rules, which will be discussed in the following sections.

### **A. International and domestic public policy**

In domestic relations, national courts apply domestic public policy since the effect of such relations will only take place in their territory, where they have the responsibility of maintaining and protecting the public policy of the community from being violated by private agreements.<sup>43</sup> In relations that have an international dimension, where foreign elements may be involved, such as in the conflict of laws or in the enforcement of foreign awards, the court of the forum may also resort to apply the domestic public policy rules in order to protect the national fundamental issues of the state from being violated by foreign elements.<sup>44</sup> The following section will illustrate the role of domestic public policy in private international relations.

### **B. The role of domestic public policy in private international law**

National courts are bound by the public policy rules of a state since such national public policy rules are designed and intended to be applicable by the court as part of their

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<sup>43</sup> Yves Derains, *op. cit.*, p. 235. He defines domestic public policy as "... a set of rules within a given legal system which parties cannot contract out of."

<sup>44</sup> Albert A. Ehrenzweig, *Private International Law*, Oceana Publications, Inc. (1967), p. 153. He states that: "... all through the history of conflicts law, public policy has been used to limit a potentially all-embracing autonomy of the parties."

legal system. A national court may, therefore apply national public policy rules to all disputes that fall within the scope of the court's jurisdiction, regardless of the proper law of the contract.<sup>45</sup> Accordingly, a court may nullify a foreign contract, disregard a foreign law<sup>46</sup>, or set aside a foreign award by virtue of its contradiction with the national public policy rules.

The flexible nature of the concept of public policy has previously been noted. It is this flexibility that makes it hard to discern the limitations to applying domestic public policy rules to private international law relations. This could be illustrated by viewing four different examples. In these examples it will be presumed that the English courts are the courts that have the jurisdiction to decide the applicable public policy rules.

Example One: It should be noted in this hypothetical example, that the applicable law to a given contract is the English law and the place where the contract will be performed is in England. The contract here is closely connected to one state, particularly that the contract will be performed and will take its effect in England. The applicable public policy rules in this example should be the domestic English public policy rules, as

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<sup>45</sup> See Okezie Chukwumerije, *op. cit.*, p. 181. He states that: "The court system is one of the vehicles through which a society expresses and protects those fundamental values that underlie its social fabric; thus national courts generally apply imperative rules that invariably represent the essential values of their societies, even in cases where the forum's law does not govern the contract."

<sup>46</sup> Hussam-al Dean Fathi Nasif, *op. cit.*, p. 460. He states that: "Public policy in private international law could be used in a negative sense. It could provide the national courts with a legitimate reason to change the jurisdiction of the applicable foreign law by permitting the court to disregard the jurisdiction of the foreign rule that the conflict of law rule indicates points to, and replace it with its national law"; Albert A. Ehrenzweig, *op. cit.*, p. 154. He states that: "each country ignores its choice-of-law rules whenever the difference between the foreign applicable rule from its own internal rule seems sufficiently offensive to justify an exception from the general rule of choice."

conceived by the English community according to their traditions and interests. Therefore, an English court may nullify the contract if it finds that it violates the English public policy rules, even if the same contract would be considered as valid in other countries.<sup>47</sup>

Example Two: In this example, one can take as given that the law of the contract was English law, but the contract will be performed in another country. Courts should consider that a foreign element is involved here, which requires consideration of the validity of the agreement according to the public policy rules of the country in which performance of the agreement will take place.<sup>48</sup> Also, one should consider that the agreement is governed by English law, and therefore, courts should simultaneously consider the application of English public policy rules, assuming this is possible.<sup>49</sup> This conclusion was reached by Chitty on Contracts when he stated that:<sup>50</sup>

“English courts will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed. This proposition is undoubtedly correct where English law is the proper law governing the contract, but there does not appear to be any overriding requirement of English public policy rendering such contracts unenforceable where they are governed by a foreign system of law and are not regarded as illegal under that system.”

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<sup>47</sup> As was previously stated, communities differ in their policies, as some countries permit some actions such as gambling, and yet others prohibit such dealings and consider this as a violation of public policy. If we also take for example, that in some Islamic Countries polygamous marriage is valid, yet this will be considered as against public policy and morality in other countries.

<sup>48</sup> In *Soleimany v Soleimany* [1998] 3 WLR 811 the Court of Appeal refused to enforce an award of the Beth Din on the grounds of public policy. The decision could be explained on the basis that the act was illegal in the place of performance.

<sup>49</sup> The application of the foreign public policy rules will depend on the courts knowledge of the foreign rules and the legal system of that state, in addition to what evidence of such rules the parties may provide to the court.

<sup>50</sup> Chitty on Contracts, *op. cit.*, p. 703; see *Ralli Brothers v. Compania Naviera Sota y Aznar* [1920] 2 K. B. 287; *Grell v Levy* (1864) 16 C.B. (N.S.) 73; also see, Dicey and Morris, *The Conflict of Laws* (11<sup>th</sup> ed.), London: Stevens, (1987), p. 1214; J. G. Collier, *op. cit.*, p. 373.



Likewise, in *Lemenda Trading Co. Ltd. V. Africa Middle East Petroleum Co. Ltd.*,

Phillips J. stated that:<sup>51</sup>

“English courts would not enforce an English law contract which falls to be performed abroad where: (1) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality; (2) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country. In such a situation international comity combines with English domestic policy to militate against enforcement”.

Example Three: In this example, according to a choice of law made by the parties, or the conflict of law rules upon which the court found that the contract is governed by a foreign law and the agreement will be performed in England. According to this example, it will be expected from the court to consider the application of the public policy rules of the law of the contract (the foreign law, which the conflict of law rules refers to), in addition to the English public policy rules, but the latter would be considered in a less restrictive manner. *Cheshire Fifoot and Furmston* illustrate such a situation, with the same view, providing that:<sup>52</sup>

“The substance of the obligation - the essential validity of the contract - must be governed by what is called the “proper law”, i.e. in effect the law of the country with which the transaction is most closely connected. Nevertheless, the rights of the parties as fixed by the proper law, if put in suit in England, are subject in general to the English doctrine of public policy. If the contract, though valid by the foreign law, is repugnant to what has been called the stringent domestic policy of England, it cannot be enforced in England. This, however, does not mean that each individual rule comprised in the comprehensive doctrine of public policy applies to a foreign contract. That doctrine strikes at acts which vary greatly in their degree of turpitude.”

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<sup>51</sup> *Lemenda Trading Co. Ltd. v. Africa Middle East Petroleum Co. Ltd.* (1988) 2 W. L. R. 735; Q. B. (1988), p. 448, p 459.

<sup>52</sup> *Fifoot and Furmston, The Law of Contract*, 11th ed., p. 370; the same was determined in *Lemenda Ltd. v. African Middle East Co.* [1988] (Q.B.D.), p.460.



One should bear in mind here that determining when to consider the application of public policy rules of a foreign law will be difficult to put into practice, since this will depend on the circumstances of each individual case. Prior to determining this issue, a competent court should give due consideration to all relevant circumstances, such as: the fact that the transaction has a close connection with the foreign country, the law of which has been violated; that such foreign law is mandatory or has vital importance to that country, and that the aim of such foreign law is to protect a serious interest for that state.<sup>53</sup>

One must consider two possibilities when applying a foreign law according to the preceding example:

1. The court may find the contract unenforceable due to illegality under the public policy rules of the applicable foreign law. The contract will then, not be enforceable in England unless the degree of illegality under the proper law is one that the English court refuses to recognise because, for example, performance of the transaction imposes an unfair discrimination upon one or both of the contracting parties.<sup>54</sup>
2. The court may recognise that the contract is valid by its applicable foreign law, but that it fails to comply with an English regulatory statute rendering similar domestic contracts void or unenforceable and accordingly may<sup>55</sup>, or may not, elect to enforce the

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<sup>53</sup> See, Chitty on Contracts, *op. cit.*, para 1154, (Illegality and Foreign Law), p. 700.

<sup>54</sup> See *Kahler v. Midland Bank Ltd.* (1950) A. C. 24; *Zivnostenska Banka National Corporation v. Frankman* (1950) A. C. 57; *MacKender v. Felda A.G.* (1967) 2 Q. B. 590, 601.

<sup>55</sup> *Quarrier v. Colston* (1842) 1 Ph. 147; *Saxby v. Fulton* (1909) 2 K. B. 208; *Sayers v. International Drilling Co.* (1971) 1 W. L. R. 1176.

agreement.<sup>56</sup> It is thought that the principle is that such agreements should be enforced, unless the social policy expressed in the English statute is of such fundamental importance that it must be applied even to a transaction with foreign elements or that the contract, or its breach, has a substantial link to national interests.<sup>57</sup>

The principle which can be deduced from such a situation, is that courts should recognise the effect of such a contract, as long as it is legal under the applicable foreign law and should to some extent, enforce such a contract, as long as it does not violate vital interests, morality and justice as conceived by the national law of the court.

Example Four: Finally, the contract may be governed by a foreign law, and will be performed in a foreign country. The contract here does not relate to England, except that English courts have the jurisdiction to decide the dispute. Primarily, it can be said here that there is no reason to apply English public policy rules, so long as this contract will not effect the English community. The important question here is: what if the foreign contract, intended to be performed in a foreign country, was contrary to the public policy

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<sup>56</sup> *Leroux v. Brown* (1852) 12 C. B. 801; *English v. Donnelly*, 1958 S. C. 494; *Brodin v. A/R Seljan*, 1973 S. L. T. 198; *Peter Buchanan LD. and Macharg v. Mcvey*. (1955) A.C. p. 528, in which the court hold that: "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered the proper law of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another"; also see, *Rousillon v. Rousillon* (1880), 14 Ch.D., p 351. The court based its decision on equity, provided that: "If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it."

<sup>57</sup> *Mitsubishi Corpn v. Alafouzos* (1988)1 FTLR 47; (1988) 1 Lloyd's Rep 191. In which it was alleged that the contract is illegal under some foreign law, the test was based on whether or not the contract would be legal when applying the English public policy.

of England? This question was considered by Wright J. in *Kaufman v. Gerson*<sup>58</sup>, where the same was raised:

“The question to be determined in this case, as it stands at present, is whether the courts of this country ought to enforce a contract made, and intended to be performed in, a foreign country, and according to the laws of that country, the contract being valid and enforceable according to those laws, but such that, if it were an English contract, the courts of this country would refuse to enforce it on grounds of public policy or of undue influence.”

In this regard, Wright J. reviewed several cases where the same point was raised.<sup>59</sup> He then decided to consider principles of public policy and morality as conceived by the English Community. Therefore, the contract will be void if it on any ground could not be validly made in England and consequently could not be performed there.<sup>60</sup>

The above example also begs a further question, if it is considered that the contract violates neither the law of the contract nor English law, but violates the public policy of a third country. The question then will be; would the court in such a case recognise or enforce the contract?

One should bear in mind that it is not expected of a court to be knowledgeable of the various legal systems of different states. In the light of this, a court may not refuse to enforce such a contract except in the case where there is an obvious violation to the

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<sup>58</sup> *Kaufman v. Gerson* (1903) 2 K. B., p 114.

<sup>59</sup> *re Missouri Steamship Co.* (1888) 42 Ch. D. 321, p. 325.; *Santos v. Illidge* (1859-60) 6 C. B. (N.S.), p. 841; *Quarrier v. Colston* (1842) 1 Ph. 147.; *Robinson v. Bland* (1760) 1 W. Bl., p. 256.; *Grell v. Levy* (1864) 16 C. B. (N.S.), p. 73.

<sup>60</sup> According to this example, the contract can be invalidated, only if the contract violates the cardinal interests, justice or morality of the English community. also see, *Sharif v. Azad* (1967) 1 Q. B. 605; *Mansouri v. singh* 1986 1. W. L. R. 1393; *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* (1983) A. C. 168, 188-191; *Rossano v. Manufacturers' Life Assurance Co.*

public policy of that third country, for example, performance of the contract would involve a criminal breach of the foreign law. This was the case in *De Wutz v. Hendricks*<sup>61</sup>, which involved a loan in support of Greek rebels against their Turkish government.<sup>62</sup> Also, of relevance here is the well-known decision in *Regazonni v. KC Sethia Ltd.*<sup>63</sup> Although the contract was perfectly legal with regard to the English proper law, it was considered null and void according to Indian law which prohibited the trade of jute with South Africa, following the apartheid measures imposed on Indians. The court considered that the agreement violated the laws of a friendly country. Parker L.J. provided that:

“...if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.”

The preceding four examples demonstrate the application of national public policy rules by courts to contractual relations that involve a foreign element. One should recognise here the difficult situation for national courts when they are confronted with a question of deciding the validity of an international contract by striking a balance between their national public policy and the public policy rules of a foreign country. This

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(1963) 2 Q. B. 352; *Libyan Arab Foreign Bank v. Bankers Trust Co.* (1988) 1 Lloyd's L. Rep. 259, 268-269; See Dicey and Morris, *The Conflict of Laws* (11<sup>th</sup> ed.), p. 1466.

<sup>61</sup> *De Wutz v. Hendricks* (1842) 2 Bing. 314.

<sup>62</sup> The plaintiff, in order to raise a loan, deposited with the defendant certain papers. The loan fell through and the purpose of the transaction, which encompassed overthrowing a friendly government, prevented the plaintiff recovering the papers. Also see, *Foster v. Driscoll* (1929) 1 K. B., p. 470 C.A.; *Toprak Mahsullri Ofisi v. Finagrain Compagnie Commercial Agricole et Financiere S. A.* (1979) 2 Lloyd's Rep. 98, p. 106.

<sup>63</sup> *Regazonni v. KC Sethia Ltd.* 1958 A.C. 301; [1957] 3 All E.R. 286.

is further complicated by the previously stated notion that courts are not expected to have knowledge of all of the public policy rules of different legal systems.

This situation will be more difficult for arbitral tribunals when deciding an international commercial dispute because arbitrators do not have a *lex fori* as national judges do and they are not obliged to apply the 'conflict of law rules' of the forum. Moreover, arbitrators cannot establish a decision on the degree of disparity between the possible injurious effect of applying a foreign law and the public policy of the forum.<sup>64</sup> Clearly this situation is unacceptable and therefore it has been proposed that in certain cases that involve a conflict between public policy rules of several legal systems, courts and arbitral tribunals could resort to a new notion of public policy. This notion is intended to assure a "minimum standard of protection" by applying international public policy rules that have been developed in the domain of international commercial relations. This notion will be further examined in the following sections.

### **III. The Development of International Public Policy Rules**

The concept of a body of international public policy rules is highly contentious. Some writers wholly deny the existence of international public policy rules unless such rules exist within the context of national law.<sup>65</sup> However, by acknowledging the recent

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<sup>64</sup> Further explanation of this matter will follow in the next chapter at p. 141.

<sup>65</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, pp. 277,278; also see Horacio A. Grigera Naon, "Public Policy and International Commercial Arbitration: An Argentine view. Comparative Arbitration practice and Public Policy in International Arbitration," Pieter Sanders ed., Kluwer Law and Taxation (1987), p. 336; also see, Hussam-al Dean Fathi Nasif, *op. cit.*, p. 462; Aktham A. El-Khoul, "The Enforcement of International Arbitral Awards," 2 *Journal of Arab Arbitration* (2000), p. 10 at 19. In his opinion; "International public policy

developments of international commerce and the wide adherence of states to international commercial treaties, one should recognise that an international commercial community has emerged and must be distinguished from the plurality of different communities. The notion of international public policy is thus constituted upon a collection of fundamental legal principles related to all or at least which covers the most fundamental notions of equity and justice. This is mainly due to the development of international commerce, which has led to a degree of co-operation between members of the international community. To develop a modern environment for international commercial relationships it was necessary to establish public policy rules suiting the needs of the international commercial community and thereby avoid the confusion caused by the existence of variable national public policy rules such as different trade prohibitions.

Achieving such harmony is possible by reducing the applicability of national public policy rules in international transactions, as compared to their wider use in domestic relations.<sup>66</sup> Also, this is achievable by seeking to find mutual principles of justice and morality<sup>67</sup> common to the majority of countries.<sup>68</sup> It could be argued in this respect, as is

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rules express the major and basic values of a defined country and not those of all countries. They are the national concept of national values for international dealings, of what is fair and acceptable and what is not so by a certain country.”

<sup>66</sup> Van den Berg, *op. cit.*, p.360. He states that: “According to this distinction what is considered to apply to public policy in domestic relations does not necessarily apply to public policy in international relations;” Karl-Heinz Bockstiegel, “Public Policy and Arbitrability,” *op. cit.*, p. 188; Christopher B. Kuner, *op. cit.*, p. 79.

<sup>67</sup> Courts for instance, cannot entertain a contract for the sale of slaves at present time. This is merely an example of the kinds of contracts that cannot be enforced around the world, as it is internationally prohibited by the various Human Rights Conventions, and by the various legal systems around the world. See Article 4 of the Universal Declaration of Human Rights: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”



the central subject of exploration in this research, that if a domestic public policy rule conflicts with the international public policy rules, then international public policy should prevail. However, despite these propositions, the notion remains at heart problematic due to the sheer diversity of fundamental issues between states, such as the different beliefs, traditions, economic policies and political trends, which may interrupt the approach towards establishing a new concept of international public policy. Recognising this problem, Alan Redfern and Martin Hunter, state that: <sup>69</sup>

“...there are bound to be practices which some states will regard as contrary to the international public policy interest, and other states will not. Agreements in restraint of competition, for example, which are the subject of punitive regulation in some parts of the world (for instance, in the U.S and the European Community) are treated with indifference elsewhere. Problems abound in formulating the concept of international public policy, but they do not vitiate the desire or need for a workable definition of it.”

It is widely recognised that international public policy serves the international community by its potential to play exactly the same role as domestic public policy in national relations<sup>70</sup>, although the difficulties that may arise in developing such rules have also been recognised most notably by Okezie Chukwumerije. He demonstrated that:<sup>71</sup>

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<sup>68</sup> Okezie Chukwumerije, *op. cit.*, p.191. He states that: “Like the concept of public policy in national law, the concept of transnational public policy presupposes the existence of “a certain community and of certain fundamental values. Unlike national public policy, the relevant community here is not a national community but the international community”; Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 277, stating that: “international public policy aimed at safeguarding principles common to all civilised nations”; Ahmed S. El-Kosheri, “Extent and Nature of Private International Law,” *Legal and Economy Journal*, 1 ed., (1968), p. 128; Abu Zaid Redwan, *op. cit.*, p. 119. He provides that: “There are modern rules which govern international commercial relationships, the source of these rules does not come from national laws but from the international commercial customs and modern means of international transactions”; Hussam-al Dean Fathi Nasif, *op. cit.*, p. 487. He states that: “some legal systems, such as, those in the ‘Arabic countries’ share principles that acquire their origin from the same source, which may institute, at least, a minimum level of interconnection and therefore, an international level of public policy between these states.”

<sup>69</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p.445.

<sup>70</sup> Abu Zaid Redwan, *op. cit.*, p. 119.



“... while the public policy of a state embodies the moral and ethical philosophy of the state, transnational public policy performs the same role for the international business community.”

He went on to define international public policy thus:<sup>72</sup>

“Transnational public policy represents the fundamental values, the basic ethical standards, and the enduring moral consensus of the international community. Its principles are derived from “the fundamental rules of national law, the principles of universal justice, *jus cogens* in public international law and the public policy accepted in a generality of nations.”

Van den Berg referred to the fundamental rules of natural law, the principles of universal justice, in public international law and the general principles of morality accepted by civilised nations.<sup>73</sup>

Klaus Berger mentioned that international public policy rules have been developed within the general principles of law<sup>74</sup> and that these international principles are agreed by the majority of states reminding us to keep in our mind that while there may be difficulties, this must not frustrate the acceptance of the existence of such rules. He stated that:<sup>75</sup>

“The fact that a majority of nations might disagree with these views need not necessarily negate their importance in shaping international public policy.”

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<sup>71</sup> Okezie Chukwumerije, *op. cit.*, p. 191.

<sup>72</sup> *Ibid.*, p.192.

<sup>73</sup> Van den Berg, *op. cit.*, p. 361.

<sup>74</sup> Klaus Peter Berger, *op. cit.*, p. 673; also see, Berthold Goldman, *Lex Mercatoria*, Kluwer Law and Taxation Publishers, Deventer, The Netherlands, (1986), at 115. He provides an explanation of the general principles of law as those principles that are common to all, or to a large majority of national legal systems. The general principles of law are determined by conducting a survey of various national laws to determine those common principles.

<sup>75</sup> Klaus Peter Berger, *op. cit.*, p. 673.

Lord Denning in *The Hollandia* case<sup>76</sup>, highlighted the importance of applying unified public policy rules in international trade stating that:

“... there is a higher public policy to be considered and that is the public policy which demands that, in international trade, all goods carried by sea should be subject to uniform rules governing the rights and liabilities - and the limitation of liability - of the parties. They should not vary according to the particular country or place in which the dispute is tried out. So many persons are concerned down the chain - buyers and sellers, bankers and insurers, endorsees and consignees - that each should know what the rules are - without having to go by the small print in any particular bill of lading...”.

Lord Denning continues:

“This public policy applies not only to contracts of carriage of goods by sea, but also to carriage by air, where again there is a statute which overrides other stipulations<sup>77</sup>, in short, it applies to all international transport.”

Alan Redfern and Martin Hunter also provide that:<sup>78</sup>

“International public policy would not concern itself with matters of form, or of purely domestic nature. It would look to the broader public interest of honesty and fair dealing.”

It can be argued that, whilst still contentious, there are various indications showing how the notion of international public policy has become increasingly acceptable, developing into a true international public policy rule.<sup>79</sup> This can also be viewed through the development of international conventions and statutes that relate to the enforcement of foreign arbitral awards.

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<sup>76</sup> *Owners of Cargo on Board the Morviken v Owners of the Hollandia (The Hollandia and the Morviken)*, [1982] Q. B. 872, at p. 884; [1983] 1 A.C. 565; [1982] 3 W.L.R. 1111.

<sup>77</sup> See *Corocraft v. Pan American Airways Inc.* [1969] 1 Q.B., p. 616.

<sup>78</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 445.

<sup>79</sup> See Christoph Liebscher, “European Public Policy- A Black Box?,” 17:3 *J.Int.Arb.* (2000), p. 73 at 74.

## A. Public policy in international conventions

International conventions play an important role in unifying the rules of different contracting states, to treat the same issue similarly within the contracting states and accordingly, reduce the differences between different legal systems.<sup>80</sup> This has been the intention in conventions concerning international economic and commercial rules, in addition to other conventions concerning the enforcement of foreign judicial and arbitral awards.

Rules aiming to prevent the violation of public policy are explicitly provided in almost all international commercial conventions, in order to provide the member states with a method with which to protect their national, fundamental interests against potential violations of their public policy.<sup>81</sup> Some of these conventions combined the notion of public policy with other principles such as good morals, religious and fundamental principles of law. For example, Article 30(a) of the Riyadh Arab Convention on Judicial Co-operation provides that:<sup>82</sup>

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<sup>80</sup> Julian Lew, *Applicable Law in International Commercial Arbitration*, *op. cit.*, p. 443. He states that: "... the individual purpose of the uniform laws is to establish internationally accepted rules to regulate the various aspects of the commercial relations to which they relate."

<sup>81</sup> See, Van den Berg, *op. cit.*, p. 360. He provides that: "A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the 'fundamental moral convictions or policies of the forum'."

<sup>82</sup> Riyadh Arab Convention on Judicial Co-operation, signed on 6 April 1983; in force October 1985. *Intl. Handbook on Comm. Arb. Suppl.* 11. January 1990. Annex 1-2; also see, Abdul Hamid El Ahdab, "General Introduction on Arbitration in Arab Countries," *op. cit.*, p. 23.

“... the recognition of a judgement may be refused in the following cases: (a) if it is contrary to the provisions of the Moslem Shari’a<sup>83</sup> or the Constitution or the public policy or good morals of the signatory State where enforcement is sought”.

The Geneva Convention of 1927 provides in Article 1 (c), a ground to refuse the recognition and enforcement of foreign arbitral awards by stating that:

“(c) ... the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”

Accordingly, the Geneva Convention referred to the principles of the law of the country in which the enforcement of the foreign award is sought. This indicates that the trend in the Geneva Convention is towards applying the domestic public policy rules of the state where enforcement will take place. It clearly used the term public policy in addition to the ‘principles of law of the state’, as an indication to apply the national legal system of the country where the enforcement will take place.

However, the New York Convention used another formula, in Article V (2)(b) the Convention provides that:

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition or enforcement is sought finds that: (a) The recognition or enforcement of the award would be contrary to the public policy of that country.”

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<sup>83</sup> In Muslim Shari’a rules, the concept of public policy is based on the respect of the general spirit of the Shari’a and its sources (the Koran and the Sunna, etc.) and on the principle that “individuals” must respect their clauses, unless they forbid what is authorised or authorised what is forbidden by Shari’a rules. See Abdul Hamid El- Ahdab, “General Introduction on Arbitration...”, *op. cit.*, p. 14; also Abdul Hamid El-Ahdab, “Enforcement of Arbitral Awards in the Arab Countries,” *I 1 Arb.Int.*, (1995), p. 169; Mohamed I.M. Aboul-Enein, “Liberal Trends in Islamic Law (Shari’a) on Peaceful Settlement of Disputes,” *2 Journal of Arab Arbitration* (2000), p. 1 at 6.

The New York Convention evades using the phrase “principles of law” as used in the Geneva Convention. Van den Berg considered this difference as an indication that the New York Convention refers to international public policy as distinct from domestic public policy.<sup>84</sup> He established his assumption on the discussion, which followed the ECOSOC Draft Convention of 1955, which provided that: “clearly incompatible with public policy or with fundamental principles”.<sup>85</sup> The Working Party No. 3, however, proposed to limit it to public policy alone, considering that “the provision should not be given a broad interpretation”.<sup>86</sup> Van Den Berg continues that this limitation was accepted by the conference, which moreover, rejected a Brazilian proposal to re-introduce “fundamental principles of law”.<sup>87</sup>

More clarification is required with regard to the phrase “contrary to the public policy of that country” as used in the New York Convention, since reference to “that country” at the end of article V (2)(b) may lead to different interpretations. It may refer to the country where enforcement is taking place or to the country(ies) with which the dispute has the closest connection. It is also unclear whether this formula refers to the domestic public policy of a particular country or to international public policy rules.

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<sup>84</sup> Van den Berg, *op. cit.*, p. 361. He states that: “the new formula of public policy ground, clearly reflect the convention’s intention to base this ground on the restrictive notion of international public policy.”

<sup>85</sup> Statement of the chairman of working party no. 3, UN DOC E/CONF. 26/ SR.17; also see, Rene David, *op. cit.*, p.400. He states that: “The draft of ECOSOC referred to ‘the fundamental principles of the law’. It was considered in the New York Convention that such adjunction were unnecessary.”

<sup>86</sup> Statement of the chairman of Working Party no.3, UN. DOC E/CONF.26/SR.17; Van Den Berg, *op. cit.*, p. 361.

<sup>87</sup> *Ibid.*, p. 362; UN DOC E/CONF.26/SR.17.

Therefore, it would have been preferable if the New York Convention had used the term international public policy or at least the term “public policy” alone<sup>88</sup>, leaving the interpretation of this article to the courts of each state. This would have provided an open invitation to courts to develop international public policy rules according to the needs emanating from the development of international commercial relations. Ultimately, this could serve to drive the courts to apply less restrictive public policy rules in the domain of international commercial arbitration.

In deliberations over the Model Law handling of the matter, this proposition (giving preference to the notion of international public policy or just public policy) was not employed (while not explicitly rejected) due to a lack of consensus on the working party and that the term was thought to lack precision.<sup>89</sup> The Model Law, in keeping with the New York Convention refers to ‘public policy of this state’.<sup>90</sup> However, the debate remains open and in agreement with the here stated position, Redfern and Hunter argue

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<sup>88</sup> Examples can be found in international conventions that use the term “public policy” alone, without giving any indication to the country where the enforcement will take place. For example, Article 35 of the Amman Arab Convention on Commercial Arbitration which provides that: “... the Supreme Court of each contracting state must give leave to enforce awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public policy.” Amman Arab Convention on Commercial Arbitration, signed 14 April 1987, Intl. Handbook on comm. Arb. Suppl.. 11, January 1990. Annex 2-1.

<sup>89</sup> It has been reported that: “During the deliberations of the Model Law the UN Secretariat suggested, in conformity with a trend in recent case law, to use the restricted term of international public policy as a ground for setting aside and refusing enforcement. The Working Group ultimately rejected this proposal because its underlying idea was deemed to be ‘not generally accepted’ and, above all, the term ‘international public policy’ was said to lack the necessary precision, (UN Doc. A/CN.9/WG.2/WP.35, para.30). There was thus no outright rejection of the principle and its application depends on the doctrine prevailing in the country that has adopted the Model Law.” Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 443.

<sup>90</sup> Article 36(1)(b)(ii) of the Model Law provides that: “the recognition and enforcement of the award would be contrary to the public policy of this state.”

that the Model Law conclusion “underestimated” the trend towards favouring the term international public policy in commercial relations.<sup>91</sup>

International commercial conventions cannot ignore the need of international commercial relations. There is an implied duty on such conventions to support the application of the concept of international public policy rules rather than relying on traditional rules of domestic public policy. This approach would effect the development of international arbitration as a reliable way to resolve international commercial disputes, and the integrity of international arbitral awards.

## **B. Statutory and judicial trends towards international public policy**

The trend towards applying international public policy is rapidly growing.<sup>92</sup> As countries become more interested in attracting arbitration, the application of the notion of international public policy has become more acceptable either in the legislative text or in court decisions.

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<sup>91</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 443. The authors here added that: “It seems that the Working Group’s evaluation of the current status of international doctrine underestimated the driving force of the trend towards a restricted notion of public policy”; also see, Klaus Peter Berger, *op. cit.*, p. 671.

<sup>92</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 445. The writers provide that: “...there is nothing new, so far as arbitration is concerned, in differentiating between national and international policy; indeed it is a consistent theme, to be found in the legislation and judicial decisions of many countries.”



The first use of the term international public policy in a statute was in the French Code of Civil Procedure, as Article 1502.5 of the civil code provides:<sup>93</sup>

“An appeal against a decision granting recognition or enforcement of an award may be brought ...If the recognition or enforcement is contrary to international public policy.”

Likewise, this approach was followed by other countries, such as Lebanon<sup>94</sup>, Algeria<sup>95</sup>, Portugal<sup>96</sup>, Tunis<sup>97</sup>, Romania<sup>98</sup> and Italy.<sup>99</sup> This statutory trend in fact, recognised two types of public policy: “national public policy”, which may be concerned with truly domestic considerations; and “international public policy”, which leads to a more

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<sup>93</sup> Article 1502.5, 7 .B. *Com. ARB.* 281- 82(1982); John Y. Gotanda, *op. cit.*, p. 102; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p.445, stating that: “The concept of ‘international public policy’ (order public International) has been devolved by French jurists and is embodied in the New French Code of Civil Procedure. This Code allows an international arbitral award to be set aside if the recognition or execution is contrary to international public policy”; Klaus Peter Berger, *op. cit.*, p. 670, stating that: “The French Decree on International Arbitration of 1981 was the first modern law to adopt this terminology as ground for setting aside international awards and refusing recognition and enforcement.”

<sup>94</sup> The Lebanon’s New Code of Civil Procedure Article 814 (Leb.), reprinted in Adel Nassar, “International Arbitration in Lebanon,” 10 *Arb.Int.*, (1994), p. 295, 301. He provides that: “Arbitral awards are recognised and enforceable if... they are not manifestly contrary to international public policy.”

<sup>95</sup> Article 458 bis 23(h) of Decree No. 83.09 (1993).

<sup>96</sup> Article 1096(f) of the Code of Civil Procedure (1986).

<sup>97</sup> Article 81. II of the Tunisian Arbitration Code (1993), makes reference to “public policy as understood in private international law”, Tunisian Arbitration Code (1993), Law No. 93-42, Annex I- 1, *Int. Handbook on Comm. Arb. Suppl.* 18 September 1994.

<sup>98</sup> Articles 168(2) and 174 of Law 105/1992 on the Settlement of Private International Law Relations, which provide that enforcement will be refused if the award “violates the public policy of Romanian private international law”, Capatina, “Romania”, *Handbook, Suppl.* 21, Aug. 1996, p. 49, in which the author states that “public policy is understood here as the public policy of private international law, which is narrower than domestic public policy.”

<sup>99</sup> The Italian approach has been illustrated by, Rubino Sammartano, M., “New international Arbitration Legislation in Italy,” 11 *J.Int. Aeb.*, p. 77, at 85 (Sept. 1994). The writer summarised the changes in the Italian international arbitration law which took place in 1994. He provides that arbitral awards will be enforced if there is no “conflict between the award and Italian international public policy”; John Y. Gotanda, *op. cit.*, p.102.

restricted use of national public policy rules. Moreover, this trend will provide courts with a statutory rule that would be considered part of their national legal system. This in turn will lead to the application of public policy rules in a less restrictive fashion and to a greater understanding of international commercial relations, particularly in cases concerning the morals and obligations of the international community.<sup>100</sup>

However, this approach towards using the term international public policy in statutory provisions, is not yet recognised by all legal systems. Nevertheless, this does not mean that other legal systems wholly disregard the application of international public policy rules. Pierre Lalive illustrates the courts' practice in this regard:<sup>101</sup>

"In an increasing number of cases, a national judge, although a state organ having the function to state and apply the law of a particular state and to ensure the respect of its fundamental principles (in particular by means of the traditional concept of external public policy) has not hesitated to recognize and give effect to a wider notion, more international or perhaps supranational, of public policy, based on the vital interests not only of the national community to which the judge belongs but also of a broader, regional or universal, international community."

For example, while the English Act of 1996 did not use the term *international public policy*<sup>102</sup>, this does not mean that English courts do not recognise the application of this notion. There is evidence proving that English courts have applied the notion 'international public policy' for the enforcement of international awards. The jurisprudence of the English courts restricts the application of national public policy in

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<sup>100</sup> John Y. Gotanda, *op. cit.*, p. 102.

<sup>101</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 286.

<sup>102</sup> Section 103(3) of the 1996 Act, provides that: "Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award."

the context of international commercial disputes.<sup>103</sup> This is a longstanding principle. As early as 1889, in *re Missouri Steamship Company*<sup>104</sup>, the court held that: “Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it”. Also in *Foster v. Driscoll*<sup>105</sup> the court nullified a contract by stating that: “not because it was illegal here but as a matter of public policy based on international comity ... and would be contrary to our obligation of international comity as now understood and recognised, and therefore would offend against our notions of public morality.”

In *Soleimany v. Soleimany*<sup>106</sup> the court applied international public policy considerations. It viewed both the violation of a foreign law, and of the concept of international dealings, as a violation of public policy. In this case the parties acknowledged that the goods (Persian carpets) were to be imported into a foreign country contrary to the revenue law and export controls of Iran. The parties, both Iranian Jews, signed an arbitration agreement providing for arbitration to take place before the Beth Din in accordance with Jewish law. The Beth Din recognised that the carpets had been

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<sup>103</sup> See, V. V. Veeder, *op. cit.*, p. 66; This was also illustrated in *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223; *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep., p 246.

<sup>104</sup> *re Missouri Steamship Company. (C.A.)* (1889), 42 Ch.D, p. 336.

<sup>105</sup> *Foster v. Driscoll.* (1929) 1 K. B., p. 496 at p.510.

<sup>106</sup> *Soleimany v. Soleimany*, Court of Appeal, February 19, 1998. Reported in [1998] 3 W.L.R. 811; [1998] C.L.C. 779.

exported illegally, but regarded that fact as irrelevant since such illegality would have no effect on the rights of the parties under Jewish law. The court held that:

“... where a foreign arbitration award was made pursuant to a valid arbitration agreement, but was based on a contract which was illegal under the law of a friendly foreign state, where that law governed the contract or the contract was to be performed in that state, the English court would not enforce that award on the grounds of public policy.”<sup>107</sup>

These cases illustrate that, notwithstanding the absence of a direct reference in English law to the application of international public policy, the application of international public policy norms by the courts has been acknowledged practice for some time.

The same approach is followed by the Egyptian courts, since the Egyptian arbitration law of 1994 does not refer to international public policy, Article 58 (2)(b) refers to public policy in the Arab Republic of Egypt.<sup>108</sup> However, the case law reveals that the concept of international public policy is not unusual to the Egyptian doctrines and in courts' jurisprudence.<sup>109</sup> Discussing this point, Hussam-al Dean Fathi Nasif<sup>110</sup> stated that “a national judge must not misuse public policy in private international law to disregard the applicable foreign law, particularly when he uses that to justify his

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<sup>107</sup> Also see, *Foster v. Driscoll*. (1929) 1 K. B. p. 522, in which Sankey L.J. held that: “To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country.”; *Westacre Investments Inc v. Jugoinport-SPDR Holding Co Ltd*. Court, (Q.B.D. (Comm Ct)) Commercial Court, December 19, 1997. Reported in. [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

<sup>108</sup> Article 58 provides in sub-section (2): “The application to obtain leave for enforcement of the arbitral award shall not be granted except after having ascertained the following, (b) that it does not violate the public policy in the Arab Republic of Egypt.”

<sup>109</sup> Ibrahim Ahmmad Ibrahim, *op. cit.*, p. 333; Moneer Abed al Majeed, *Arbitration in International Commercial Disputes*, Dar al Mabo'at al Gam'iah, (1995), p. 280. (in Arabic).

confusion and unfamiliarity with the foreign law, otherwise this will hinder private international relations". The Court of Cassation, on April 5<sup>th</sup> 1967, took the view that, it was necessary to consider the application of international public policy, taking into consideration the fact that the application of public policy in private international relations would be found on principles substantially different to those contained within the relevant Egyptian law. Recognising the potential for this violating the interests of the state, the court provided that:<sup>111</sup>

"According to Article 28 of the civil law, it is not allowed to exclude the application of an applicable foreign law unless it is contrary to the Egyptian public policy and morality or it contradicts with the state constitution or a public essential interest of the community. However, a court must consider the application of international public policy in that if the difference between the foreign law and the Egyptian public policy rules is not substantial, then the court should not consider that difference as leading to a violation of national public policy."

Reference to international public policy in international commercial arbitration was clearly emphasised in *Arabic Continental Navigation v. Arabic Gulf Contractors*.<sup>112</sup> The Egyptian Court of Cassation demonstrated the apparent approach of the Egyptian courts by differentiating between the application of public policy in international and in domestic relations. This case relates to the requirement to nominate the arbitrators in the arbitration agreement (before the legislation of 1994), in accordance with Article 502(3) of the Procedures Law No. 13 of 1968.<sup>113</sup> Pursuant to a charter agreement the plaintiff,

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<sup>110</sup> Hussam-al Dean Fathi Nasif, *op. cit.*, p. 467.

<sup>111</sup> The court of Cassation on April 5. 1967, the Collection of the Cassation Decisions (Civil department) s 18 1967, p. 79.

<sup>112</sup> Cassation Court, Decision No. 714/ 47 k, the Collection of Cassation's Decisions. 26 April 1982. Vol. 32, p. 422.

<sup>113</sup> The requirement of nominating the arbitrators in the arbitration agreement will be handled in more details later in Chapter Five, see p. 232.

Arabic Continental Navigation, claimed for the revocation of the contract by the defendant. The defendant replied by asking the court to refer the dispute to arbitration as agreed in the charter agreement. The court decided to reject this petition as it considered the agreement to arbitrate null and void, because it did not contain the names of the arbitrators in accordance with the conditions cited in Article 502(3) of the Procedures Law No. 13 of 1968. Therefore, it was considered contrary to Egyptian public policy.<sup>114</sup> The appeal court confirmed this decision. Then the Court of Cassation dismissed the appeal on the ground that:

“... it is not reasonable to apply the Egyptian law on international arbitration where the applicable law was the English law and England is the country where the arbitration should take place.”

The court held further that:

“... as the charter agreement revealed, any dispute will be settled by arbitration in London. Therefore, the law applicable to the arbitration shall be the English law, and accordingly, it is not convenient to nullify the agreement to arbitrate by applying Article 502(3) of the Egyptian procedural law and to exclude the application of a foreign law, due to Article 28 of the Civil Law. The exclusion of a foreign law can only occur if that law violates the essential issues of social, political, or moral attitude in Egypt and relates at the same time with the maximum interests of the community. Therefore, it is not sufficient if it merely contradicts a mandatory rule. Thus, Article 502(3) of the procedural law does not apply, as it does not represent a public policy rule of international relations.”

The same result was reached in *Egypt Insurance Co. v. Alexandria agency for navigation*.<sup>115</sup>

Similarly, the international trend towards applying the notion of international public policy has been clearly accepted as evidenced by the decisions of the courts in several different states. Mention should be made of some significant decisions that have

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<sup>114</sup> Article 58(2) of that Procedures Law No. 13 of 1968 which refers to the public policy of the Republic.



been considered by writers who provided examples from different countries following this trend. For example, the Court for Civil Justice in the Canton of Geneva clearly drew a distinction between domestic and international public policy in a decision on September 17, 1976. The Federal Tribunal, in a case where the Geneva Convention was applicable declared that:<sup>116</sup>

“The purport of the exception based on *ordre public* is narrower when the matter involved is the execution of foreign arbitral awards than when it is the execution of foreign judgements. The exequatur to a foreign arbitral award shall only be refused when a fundamental principle of the Swiss legal order has been violated, so that our sense of justice is intolerably offended ... An appeal to *ordre public* ought not to serve as an instrument for the avoidance of the application of International Conventions which have been signed by Switzerland and which are therefore part of Swiss law. The result of such a manipulation would eventually amount to a refusal to apply Swiss law. In a word, recourse to public policy ought not to be employed to violate a Convention, whose purport is precisely to take into account the existence of different laws and to co-ordinate different legal systems.”

However, inconsistency of the application of international public policy was most evident in the Swiss Supreme Courts severe rejection of the notion of *ordre public international*, wherein it provided that:<sup>117</sup>

“It concerns rather a formula proposed by certain authors, who do not, however, give it a precise and unambiguous meaning. It cannot be ascertained how this *ordre public international* would limit the application of the foreign law more, or in another manner, than Swiss public order does.”

The latter decision was heavily criticised and described as a “true horror case” since it does not reflect the true Swiss judiciary practice.<sup>118</sup>

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<sup>115</sup> Decision no 1259/49, 13 June 1983, Collection of Cassation's Decisions. Vol. 34, p.1416.

<sup>116</sup> Trib. Cant. Geneva, Sept. 17, 1976, Sem. Jur. 1977, 505 Yearbook IV (1979), 311. Cited in, Rene David. *op. cit.*, p. 400.

<sup>117</sup> *Societe des Grands Travaux de Marseille (SGTM) v. People's Republic of Bangladesh and the Bangladesh industrial Development Corporation (BIDC)*, Swiss Tribunal Federal, May 5, 1976,



In conclusion, there is growing international awareness of the notion of international public policy that is distinct from the notion of national public policy.<sup>119</sup>

Recognition of the importance of this distinction can be found in the following doctrines:

John Gotanda stated that:<sup>120</sup>

“Unlike domestic public policy, which includes all of the imperative rules of the state in which enforcement is sought, international public policy encompasses only those basic notions of morality and justice accepted by civilised countries.”

Bockstiegel<sup>121</sup> illustrates the development of a “truly international public policy”:

“[as]... comprised only of the common denominators in values and standards of the international community, despite the fact that many of these obviously differ from the public policy of individual member states.”

Sever provides that:<sup>122</sup>

“... transnational public policy essentially refers to a system of rules and principles, including standards, norms and customs, that are accepted and commonly followed by the world community.”

Buchanan provides that:<sup>123</sup>

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*Arrets du Tribunal Federal* 102 la 574, summarised in yearbook Vol. 5(1980) p. 217. Cited in, Van den Berg, *op. cit.*, p.361, fn. 344.

<sup>118</sup> Klaus Peter Berger, *op. cit.*, p. 675.

<sup>119</sup> Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 286. He provides here that: “it is no longer rare today that the courts of the forum take into consideration, in international economic relations, basic requirements of solidarity and of ‘comity’. When performing this often delicate, not to say political, function, the judge of the forum, of course within the well-understood limits of its international public policy, accepts the task of protecting a common international public policy.”

<sup>120</sup> John Y. Gotanda, *op. cit.*, p. 102.

<sup>121</sup> Karl-Heinz Bockstiegel, “Public Policy and Arbitrability,” *op. cit.*, p. 180.

<sup>122</sup> R. Sever, “The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?,” 65 *TULL.REV.* (1991), p. 1661.

<sup>123</sup> Mark A. Buchanan, *op. cit.*, p. 514.

“The concept of transnational public policy, a much debated notion itself, is said to represent the existence of an international consensus a universal standard or accepted norms of conduct that must always apply.”

Gary Born further states that:<sup>124</sup>

“While the traditional concept of international public policy is still based upon domestic public policy, transnational public policy originates in substantive norms derived from international sources and not from domestic ones thus making it truly international.”

Julian D.M Lew<sup>125</sup> refers to common principles of international public policy rules by stating that:

“This doctrine of international public policy includes an abhorrence of slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; opposes any effort to subvert or evade the imperative laws of a sovereign state; upholds fundamental human rights (as declared in the U.N. Universal Declaration on Human Rights) and the basic standards of honesty and *bona fides*; and endorses certain rules and practices contained in the major and widely accepted uniform laws and international codes of practice.”

The development of these rules was been described by Pierre Lalive:<sup>126</sup>

“.. it is interesting to observe how judicial practice, in its recent evolution, has gradually broadened its horizons, from the sole taking into consideration of the public policy of the forum to that of the public policy of a foreign state, then of the public policy common to several States, and finally of a public policy more and more international”.

All the above evidence suggests that international commercial relations should be subject to international public policy rules. In order to achieve this the application of domestic public policy rules must be restricted while at the same time the international

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<sup>124</sup> Gary B. Born, *International Commercial Arbitration in the United States*, (1994), p. 538-539.

<sup>125</sup> Julian D.M Lew, *Applicable Law in International Commercial Arbitration*, *op. cit.*, p. 534-535.

<sup>126</sup> Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 260.

public policy rules and moralities of the international community must be applied. It is also necessary to distinguish between the two concepts of public policy, according to their purpose<sup>127</sup>: while domestic public policy rules serve the interests of the community in a given state, international public policy defends the interests of the international community, such as; drug smuggling, bribery, slavery, racial, religious and sexual discrimination, kidnapping, murder, piracy, terrorism; fundamental human rights, and environmental issues etc.

To avoid any potential conflict in deciding public policy issues, all parties should be familiar with the public policy of the countries to which their agreement relates. Each party should respect the public policy of the country that might relate to the contract, whether because the contract will be performed in that country or because the law of that country is the applicable law. The application of public policy rules should be considered throughout the different stages of international arbitration.<sup>128</sup> The next chapters of the study will explore the applicability of public policy (whether national or international) in each of the successive stages of the arbitration process and enforcement of the award; during the arbitration proceedings to examine the arbitral tribunal's duty to respect and apply public policy, then the court of the forum, if it was asked to set the award aside and finally the court where the award will be enforced as a foreign award.

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<sup>127</sup> This distinction will occur repeatedly in the rest of the topics of this research.

<sup>128</sup> As has been stated above, the application of public policy rules in arbitration may occur at different stages. However, in international commercial arbitration the problem is to decide which public policy rules are to be applied.

## **CHAPTER THREE**

### **DECIDING ON PUBLIC POLICY RULES BY THE ARBITRAL TRIBUNAL**

## Chapter Three

### Deciding on Public Policy Rules by the Arbitral Tribunal

As has been previously stated, the question of applying public policy rules may arise at different stages of the arbitration process, which ultimately would affect the recognition and enforcement of the final arbitral award. One should consider in this respect that the extent of applying public policy may differ between these different stages: for example, what an arbitrator may consider as the applicable public policy rules to determine the validity of the arbitration agreement, or the applicable law to the arbitration procedures or the substance of the dispute may not necessarily be the same as what a court may consider as applicable. This is mainly due to the difference between how arbitrators and courts perceive their functions. Courts are the guardians of their national legal systems and therefore they are obliged to give preference to the public policy rules of their national legal systems over any foreign mandatory rule. On the other hand, international commercial arbitrators are not guardians of a particular national law and they have no allegiance to a particular state<sup>1</sup>, since they derive their authority from an agreement between two private parties. Thus they are not bound to protect a particular

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<sup>1</sup> For an international commercial arbitrator, all state laws are on an equal footing and none of them has a privileged status. See, Bernard Hanotiau, "What Law Governs the Issue of Arbitrability?," 12 *Arb.Int.*, No.4 (1996), p. 391; Daniel Hochstranger, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 11 *J.Int.Arb.*, (1994), p. 57 at 59. This writer considers that: "The arbitrator has no duty whatsoever to respect the mandatory rules of the forum because he does not have a forum, and even less to respect public policy of a state, the law of which has not been chosen by the parties, just because this law pretends to be applicable."

national interest.<sup>2</sup> Nevertheless, as will be demonstrated later in this chapter, an arbitrator in international commercial arbitration has a duty to provide the parties with an enforceable arbitral award, which would entail consideration of the application of the various national mandatory rules that are relevant to the dispute.<sup>3</sup>

In this chapter the main question to be examined does not concern the problem of deciding the validity of the arbitration agreement by the arbitral tribunal or the ability of the arbitral tribunal to rule on the existence and scope of its own jurisdiction. The latter question relates to the principle of Competence-Competence by virtue of which an arbitrator can give a final ruling on his own jurisdiction which generally should be raised at the early stages of the arbitration process before submitting the respondent's statement of defence.<sup>4</sup> The Competence-Competence principle is closely related to the concept of separability or independence of the arbitral clause, since in deciding its own competence the tribunal needs to refer to the arbitration clause. The separability doctrine and the competence of the arbitral tribunal to rule on its own jurisdiction are now fully

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<sup>2</sup> The duty of arbitrators to consider the application of public policy rules as a distinction from courts' obligation to apply public policy of their national law has been taken into account in ICC award Case No. 2178 1973. Cited in, Yves Derains, *op. cit.*, p. 253, the award contained the following statement, "The narrow links between State Courts and their national law which compel the application of their national law to the solution of problems of conflict of law that present themselves to national jurisdictions are absent in arbitration proceedings which are based on the parties will. As long as it does not relate to a law of public policy which applies to the parties within the realm of their respective rights and which the arbitrators must take into consideration."

<sup>3</sup> Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," 18:2 *Journal of International Arbitration* (2001), p. 135.

<sup>4</sup> See for example, Article 16 of the Model law; Article 22 of the Egyptian Law; Carlos E. Alfaro and Flavia Gumerey, "Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment," 12 *Arb.Int.*, No.4 (1996), p. 415 at, 419; Bernard Hanotiau, *op. cit.*, p. 391.

recognised by several conventions and rules of arbitration.<sup>5</sup> For example, Article 23 (1) of the LCIA Rules; Article 6 (4) of the ICC Rules<sup>6</sup>; Article 16 of the Model law; Article 22 of the Egyptian Law of 1994; Section 7 and Section 30 (1) of the English 1996 Act.<sup>7</sup>

Based on the above consideration, this chapter will examine the potential conflict of public policy rules that could be raised during the arbitration process. The question mainly relates to determining the applicable public policy when the dispute involves claims that more than one law is applicable. This requires that the following questions be addressed: firstly, whether or not arbitral tribunals have a duty to consider the application of public policy rules during the arbitration process and secondly how an arbitrator can determine the conflict of public policy rules in the domain of international commercial arbitration. In order to answer these questions it will be necessary first to examine the rules applicable to international commercial arbitration and how they can be determined. This will be followed by an analysis of the arbitral tribunal's duty to comply with the public policy rules.

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<sup>5</sup> Many countries recognise the effect of an arbitration agreement even where the validity of the main contract is in issue or is void. See, Julian DM Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on that Jurisdiction", *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 73 at 76.

<sup>6</sup> This has been confirmed in ICC final Award Case No. 6437 (1990) *reprinted in* ICC International Court of Arbitration Bulletin, vol. VIII/1 (May 1997) at 64. "It is universally accepted that an arbitral tribunal or arbitrator is competent to determine its own competence to hear the dispute. This power is based not on the rules of local procedure, but derives simply from powers granted to it pursuant to Art. 8(3) of the ICC Rules."

<sup>7</sup> See, *Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd.*, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111.



## I. Applicable Rules in International Commercial Arbitration

Generally, international commercial arbitration is subject to different legal systems, which vary according to the different stages of arbitration. These bodies of law include; the law which governs the parties' capacity to enter into arbitration and to constitute a valid arbitration agreement<sup>8</sup>; the law which governs the arbitration agreement<sup>9</sup>; the law or the set of rules which governs the proceedings of arbitration<sup>10</sup>; the law, or set of rules which governs the substantive issues of the dispute<sup>11</sup>; and finally the law governing the recognition and enforcement of the arbitral award.

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<sup>8</sup> This legal system has a considerable effect on the arbitral award, since the New York Convention emphasised the necessity for a valid arbitration agreement. Article V (1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the parties were, "under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"; see Article 34 (2)(a)(i) and Article 36 (1)(a)(i) of the Model Law; The importance of considering the application of this law has been subject to a great deal of analysis by several writers, see for example, Lawrence Collins, "The Law Governing the Agreement and Procedure in International Arbitration in England," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 126; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 72.

<sup>9</sup> See Article V (2)(a) of the New York Convention; Articles 34 (2)(a)(i) and 36 (1)(a)(i) of the Model Law.

<sup>10</sup> How the applicable procedural rules are determined is of great importance and needs to be discussed in more detail since the effect of procedural public policy rules will repeatedly occur through the different stages of this study.

<sup>11</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 96. The authors demonstrate the meaning of the law that governs the substance of the dispute, providing that: "... the law that supports the main contract is the governing law, the applicable law, the proper law of the contract. These various terms all denote the particular system of law which governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance and consequences of breaches of the contract."

Since arbitration is founded on a contract, it follows that parties to an international commercial contract can autonomously agree to settle any disputes.<sup>12</sup> In international commercial arbitration, “parties’ autonomy” means that parties can, within certain limitations, determine which law governs issues involving the nature of their obligations, the validity of their contract<sup>13</sup>, the arbitration proceedings and the law applicable to the substance of their dispute.<sup>14</sup>

The general trend in international commercial arbitration is to give parties a complete discretion in designating the applicable law<sup>15</sup>, providing that the application of the choice of law rules does not lead to a violation of the public policy of the countries

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<sup>12</sup> The autonomy of the will of the parties is fully recognised in this connection. See Rubino-Sammartano, M., *op. cit.*, p. 283, “Parties autonomy has been recognised as one of the cardinal elements of international commercial arbitration”; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 97; Okezie Chukwumerije, *op. cit.*, p.79; A.J.E Jaffy, *Topics in the Choice of Law*. The British Institute of International and Comparative Law. (1996), p. 20, where the author explains the reasons which drive the parties to make their own choice of law; also see, Clive M Schmitthoff, “Finality of arbitral awards and judicial review,” *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 230; J. G. Collier, *op. cit.*, p. 159.

<sup>13</sup> Subject to the rules of public policy, the parties are free to agree upon such terms as they may decide. Such limitation, for example, is clearly provided in Section 1 (b) of the English 1996 Act, which provides that: “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”

<sup>14</sup> Parties’ choice when choosing the ‘procedural rules’ may vary when deciding the applicable ‘substantive rules’. The distinction between the choices involved in selecting procedural rules and the applicable substantive rules has been recognised in *Cie Tunisienne v. Cie d’Armement* (1971) A.C., p. 572. The arbitration proceedings were governed by the English law and the French law was the law applicable to govern the substantive issues as it was the law which is most closely connected to the dispute.

<sup>15</sup> See ICC Award, Case No. 1581/1971, *ICC International Court of Arbitration Bulletin*, p. 14. The arbitral tribunal expressly stated that: “... the arbitral tribunal derives from the terms of reference the entire scope of its powers and of its competence and unlike a State Court, it is bound by the will of the parties where such parties are unanimous on the question”; see also, Yves Derains, *op. cit.*, p. 238.

closely connected to the dispute.<sup>16</sup> In the absence of the parties' choice, arbitrators will be obliged to decide the applicable rules. This duty emanates from their paramount duty to resolve the dispute and to provide the parties with a binding decision that can be recognised and enforced by national courts.<sup>17</sup>

Determining the applicable law in international commercial arbitration affects the decision as to applicable public policy rules during the arbitration process, and may be relevant later in the process if the award is challenged before a competent authority for being contrary to rules of public policy.<sup>18</sup> It is therefore important to examine the freedom of the parties to choose the applicable procedural and substantive rules and in the absence of the parties' choice, to study the decision of the arbitral tribunal in determining these rules.

#### **A. Parties choice of procedural rules**

In determining the rules that should govern arbitration procedures, parties have a wide degree of freedom to agree to rules of arbitral procedure, and have a wide variety of

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<sup>16</sup> See Kolkey, "Attacking Arbitral Awards : Rights of Appeal and Review in International Arbitrations," (1988) *International Lawyer*, p. 693.

<sup>17</sup> Such obligation could be inferred from Article 32 (2) of the LCIA Rules and Article 35 of the ICC Rules (1998); in *Carlisle Place Investments Ltd v. Wimpey Construction (UK) Ltd.*, 15 BLR 109 (1980), Robert Goff J stated: "the arbitrators duty is to decide the matter which has been submitted to him, and he also has a duty to act fairly as between the parties"; also see, John A Tackaberry, "The Conduct of Arbitration Proceedings Under English Law", *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p 216 at 217; Pierre Lalive, *op. cit.*, p. 273, provides that an arbitrator "must strive to render a valid award capable of being recognized and enforced."

<sup>18</sup> See Comment, "General Principles of Law in International Commercial Arbitration," (1988), 101 *Harv. L.Rev.*, p. 1816 at p.1817. He explains the importance of the choice of law, which is made either expressly or impliedly, in an arbitration or jurisdiction clause as it reduces the uncertainty arising from the existence of divergent national laws.

rules and laws to choose from. They can agree to submit the arbitration proceedings to be dealt with under the national arbitration law of a specific country<sup>19</sup>, where quite often parties prefer to choose the law of the state in which the arbitration is administered.<sup>20</sup> They may also choose to apply the arbitration procedures of an institutional body, such as the ICC or the LCIA Rules. Finally, they can determine the applicable procedural law by directly composing the rules with which the arbitral tribunal must comply.<sup>21</sup>

The parties' free consent to choose the rules that govern the arbitration procedures has been recognised by international conventions<sup>22</sup>, international institutions of

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<sup>19</sup> Many contracts contain clauses which expressly submit them to the law of a certain country. This may be done for several reasons, for instance, in order to obtain the co-operation of the courts in that state. Also a national system of law will be a known and existing system, capable of reasonably accurate interpretation by experienced practitioners. Parties often want a neutral law or a well-developed law to apply. See, Ole Lando, "The law applicable to the merits of the dispute," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 104; ICC Case No. 1512/1971, *Journal du Droit International*, p. 905. Date of publication 1974; *Y. Comm. Arb.*, 1976, p. 128; S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards: 1974-1985* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990); also see, *James Miller and Partners Ltd. v. Whitworth Street Estates Ltd.* [1970] 1 All E.R. 796; cited also in, [1970] 2 Weekly Law Review, p. 728 (H.L.).

<sup>20</sup> However, this does not prevent the parties from choosing a national procedural law different from the law of the forum. This possibility was discussed in *Bank Mellat v. Helleniki Techniki* Court of Appeal, England, June 28, (1983) 3 All ER 4J1.

<sup>21</sup> Abu Zaid Redwan, *op. cit.*, p. 93. He states that: "This kind of arrangement is usually followed in *Ad Hoc* arbitration, where parties initially undertake the formation of the arbitration procedures. But due to practical difficulties which may arise from allowing the arbitral procedures to be determined directly by the parties, a process which may conflict with the mandatory procedural rules, parties of international commercial arbitration often choose arbitration rules that are more suitable and are specifically designed to govern such arbitration procedures." *Emphasis added*); The difficulty of composing the arbitral procedures by the parties was also emphasised by Marianne Roth, "False Testimony at International Arbitration Hearings Conducted in England and Switzerland," 11 *J. Int. Arb.*, (March 1994), p. 8. The writer provides that: "... such an arbitration agreement would require not only skilled draughtsmanship but also time consuming negotiations between the parties, and is, therefore, rarely done, especially if the dispute involves parties of different legal cultures."

<sup>22</sup> For example, Article 2 of the Geneva Protocol provides that the constitution of arbitral tribunals and arbitral procedure shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place; Article 1 of the Geneva Convention of 1927

commercial arbitration<sup>23</sup> and by the domestic laws of different countries.<sup>24</sup> For example, Section 16 of the English 1996 Act demonstrates the procedures that should be followed when appointing an arbitral tribunal and gives the parties a free choice in deciding this issue. Moreover, Section 35(1) provides that:

“The parties are free to agree- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms as may be agreed.”

Also Section 38 (1) provides that:

“The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.”

In Egypt, Article 25 of the law No. 27 of 1994, provides that:

“The two parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal, including the right to submit the arbitral proceedings to the rules prevailing under the auspices of any arbitral organisation or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral tribunal may, subject to the provisions of this law, adopt the arbitration procedures it considers appropriate.”

The UNCITRAL Model Law of 1985 specifies in Article 19 (1) that:

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provides the parties with freedom to decide the manner in which the arbitral tribunal is to be constituted; the New York Convention in its list of grounds for refusal to enforce foreign arbitral awards does not include the question of the law applicable to the dispute, nevertheless, Article V (1)(d) of the New York Convention requires that the arbitral procedures are agreed by the parties.

<sup>23</sup> For example, Article 14 (1) of the LCIA Rules of 1998 provides that: “The parties may agree on the arbitral procedure, and are encouraged to do so”; Article 15 (1) of The ICC Rules of 1998 provides that: “The proceedings before the arbitral tribunal shall be governed by these rules, and, where these rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”

<sup>24</sup> Most states allow parties some flexibility to choose the procedural rules applicable to the arbitration. See Baker and Davis, “Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal,” (1988) 23 *Int.Law.*, p. 81 at 83.

“Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

This can also be inferred from Article V (1)(d) of the New York Convention since it requires the composition of the arbitral authority and the arbitral procedure to be “in accordance with the agreement of the parties” otherwise, recognition of the arbitral award may be refused.

These different provisions exemplify the international trend in recognising the freedom of parties to decide the applicable procedural rules. However, while parties can agree to the rules of procedure that will apply to their arbitration, they cannot derogate from the control function of the courts at the seat of arbitration, except to the extent that the law of the arbitration site permits them to do so. This will be explored in more depth later in this chapter.

## **B. Deciding the applicable procedural rules**

Where the parties’ clear intention is absent, the arbitral tribunal will decide the applicable procedural rules according to what the arbitrators consider appropriate to govern the arbitration proceedings. The procedural rules of the country in which the arbitration is taking place (*the forum*) are perhaps, those most likely to be applied. The defenders of the so-called ‘*seat theory*’ assert that applying the law of the country in which arbitration takes place is inevitable.<sup>25</sup> There may be several reasons for this.

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<sup>25</sup> See Andrew Beck, “Floating Choice of Law Choices,” [1987] *LMCLQ*, p. 523 at 529; ICC Award 5029/1986, *Collection of ICC Arbitral Awards*, Volume II, 1986-1990, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, p. 69, 480.



Firstly, there is the matter of the impact of these rules on the enforceability of the final arbitral award. In this respect Article V (1)(d) of the New York Convention indicates that, in the absence of the parties' choice, enforcement of the arbitral award may be refused if the composition of the arbitral authority and the arbitral procedure "was not in accordance with the law of the country where the arbitration took place."<sup>26</sup> This may indicate that arbitrators are required to comply with the procedural law of the place of arbitration or at least to consider the mandatory procedural rules of this law as accompanying a national law. Nevertheless, it has been submitted that:<sup>27</sup> "the Convention seems only to regulate the consequences of certain invalidities in the arbitration agreement and of its setting aside by given courts of law. It does not state that the award must be made under a national procedural law, or that an award cannot be recognised if it has not been made under a national procedural law."

Secondly, the law of the forum may also be applied because of a necessary interrelation between the arbitral tribunal and national courts.<sup>28</sup> This can be recognised by considering two aspects of this relationship. Firstly, the law of the forum helps to fill the gaps in the procedural rules of the choice of law if the law chosen by the parties or by the tribunal fails to provide a solution for the prospective procedural deficiency.<sup>29</sup> Secondly, this relationship can be recognised by considering that there are rules of law which

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<sup>26</sup> Also see, Article 2 of the Geneva Protocol of 1923.

<sup>27</sup> Rubino-Sammartano. M., *op. cit.*, p. 289.

<sup>28</sup> In this regard one should recognise the importance of choosing a particular country to be the forum of arbitration procedures since the familiarity of a particular law in a certain place may be effective in helping the arbitration process and in reducing problems which may arise before, during or after an international arbitration. See Adam Samuel, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate," (1992) *Arb.Int.*, p. 257.



provide national courts with the authority to give orders, which reach beyond the parties agreement and the tribunal's power, such as, the freezing of Bank accounts or the detention of goods.<sup>30</sup>

Thirdly, a main reason that has been presented to justify the jurisdiction of the forum's law is the national courts' right to supervise the arbitration process. This reason is based mainly on the hypothetical theory that once the parties choose a particular country to be the forum of their arbitration they accordingly agree to submit their arbitration to the legal framework of the forum which will both assist and, to some degree, control the arbitration proceedings.<sup>31</sup> In this regard Mann commented that:<sup>32</sup>

"A state has the right to supervise and regulate every activity which occurs within its territory, and every arbitration even if it relates to international transactions should be subject to a specific system of national law in order to give national courts the right to supervise the conduct of the arbitration to insure that the proceedings are in conformity with requirements of justice and fairness."

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<sup>29</sup> William W. Park, "The *Lex Loci Arbitri* and International Commercial Arbitration," 32 *INT'L & COMP. L. Q.*, (1983), p. 27.

<sup>30</sup> It is essential to have regard to the usual rules and practice of the place in which the arbitration is held, which is likely to include such matters as disclosure of documents, rules of evidence, freedom of the parties to be represented by counsel of their own choice and so on. See, for instance, Article 27 of the Model Law (1985); J Martin H Hunter, "Judicial assistance for the arbitrator," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 195; Berthold Goldman, "The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective," 60 Years of ICC Arbitration-A Look at the Future, *ICC publication* (1984) No. 412, p. 275.

<sup>31</sup> See, *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep., p. 223; *Marine Contractors Inc v. Shell Petroleum Development Co of Nigeria*, [1984] 2 Lloyd's Rep, p. 77.

<sup>32</sup> F. A. Mann, "Lex Facit Arbitrum," in P. Sanders (ed.) *International Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967), p. 133 at 159; also see, Okezie Chukwumerije, *op. cit.*, p. 86.

Finally, this relationship could be established upon the concept of “nationality of arbitral awards”, whereby the arbitral award assumes the nationality of the forum.<sup>33</sup>

This trend which calls for the application of the law of the forum, however, conflicts with the ‘*delocalisation theory*’.<sup>34</sup> This theory calls for detaching of international commercial arbitration from the control of the national legal system of the forum. Its aim is to allow arbitral tribunals to resort to other procedural rules and not to be confined to the national procedural rules of the forum. Under this approach an arbitral tribunal is free to apply the rules of any legal system even if these rules do not belong to a particular national law.<sup>35</sup>

Contrary to the ‘*seat theory*’, the ‘*delocalisation theory*’ argues that selecting a place for international arbitration does not necessarily mean that parties have intended to

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<sup>33</sup> The importance of deciding the nationality of an arbitral award could be attributed to the reservation clauses that can be found in several international conventions for the enforcement of foreign arbitral awards, as countries may insist on applying the convention only between the member states. See, Klaus Peter Berger, *op. cit.*, p. 656; Enonchong, “Public Policy in the Conflict of Laws: a Chinese Wall Around Little England,” *INT’L & COMP. L. Q.*, (1996) 45, p. 633; W. Laurence Craig, “Some Trends and Developments in the Laws and Practice of International Commercial Arbitration,” 30 *Tex. Int’l L.J.* 1, (1995), p. 23.

<sup>34</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 82; Okezie Chukwumerije, *op. cit.*, pp. 85 and 88; Rubino-Sammartano. M., *op. cit.*, p. 287; Jan Paulsson, “The extent of Independence of International Arbitration from the Law of the Situs,” *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 141; *Texas Overseas petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1979) IV *Yearbook Commercial International*, p. 177; *Saudi Arabia v. Arabian Am. Oil Co. (Aramco)*, 27 I.L.R. 117, 159-83 (1963).

<sup>35</sup> Article 15 (1) of the ICC Rules of (1998) supports this theory. It provides that: “The proceedings before the arbitral tribunal shall be governed by these rules,... ,whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration”; In *Dallal v. Bank Mellat*, Q. B., June 2, 3, 26, 1985 (1985) 1 All ER., p. 239, the English High Court held that: “English law does not deny the possibility of a different curial law”.

apply the procedural law of the forum.<sup>36</sup> In fact parties may wish to avoid the procedural law of the forum, the country they choose to be the forum of their arbitration might not necessarily have any connection with the parties or the dispute.<sup>37</sup> This may frequently happen in international commercial arbitration, as parties may choose the forum for reasons which may be entirely fortuitous, and which bear no relation whatsoever to the dispute submitted to the arbitral tribunal.<sup>38</sup> Furthermore, as previously stated, parties are allowed to choose the procedural law by themselves, so they can choose procedural rules, which may not relate to any national legal system.<sup>39</sup> Therefore, in the absence of the parties' choice, arbitrators can act on behalf of the parties and select the rules that they may find suitable.<sup>40</sup> Finally, applying the procedural rules of the forum may lead to the

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<sup>36</sup> The place of arbitration, however, may not even be chosen by the parties, but could be designated instead by an arbitration institution, such as the ICC. The Arbitral Tribunal in ICC Case No. 1512 /1971, Y. Comm. Arb., (1976), p. 128; *Clunet* 1974, at 905, S. Jarvin and Y. Derains; *Collection of ICC Arbitral Awards: 1974-1985* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990) 3 at 4-5. The award provided that the parties, having agreed to have their dispute settled under the Rules of the ICC Court of Arbitration, which gave the Court of Arbitration the power to fix the place of arbitration when it was not agreed upon by the parties. See Article 14 (1) of the ICC Rules of 1998; Article 16 of the LCIA Rules; Article 16 (1) of The Cairo Regional Center for International Commercial Arbitration (CRCICA) which provides that: "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration."

<sup>37</sup> The importance of having a connection between the forum and arbitration was considered in *Bank Mellat v. Helliniki Techniki* (1984) Q.B, p. 291.

<sup>38</sup> The selection of the place of arbitration may depend on considerations that have no connection with the dispute between the parties. For example, arbitration may take place in a neutral country, in the sense that it is not the home of either of the parties to the arbitration. See *R Pagnan and Fratelli v. Corbisa industrial Agropacuaria Ltd.*, (1971) 1 All ER 165; [1970] 1 W.L.R. 1306. However, in regard to this particular point, Van den Berg argues that this argument was valid some 20 years ago, but nowadays parties generally choose a place of arbitration that provides an adequate legal framework for their arbitration. A J van den Berg, "The Efficacy of Award in Intercom Arbitration," 58 *The Journal of the Chartered Institute of Arbitrators* (1992), 267 at 271.

<sup>39</sup> We have already seen how parties, are granted complete liberty to establish the arbitral procedure by a number of rules drafted by arbitral institutions, such as the ICC Rules.

<sup>40</sup> A. J. Jaffy reflects this tendency as transferring the freedom of the parties to the arbitral tribunal. He comments that: "If the parties are free to decide the law applicable to their dispute

application of national public policy rules to an international arbitration and to the subjection of international commercial relations to the requirements of national rules which may be obscure, narrow and may vary considerably from country to country.

Nevertheless, the “*delocalisation theory*” may encounter a number of difficulties. Laurence W. Craig argues that<sup>41</sup>, “States have been unwilling to accept the idea that there is no link whatsoever between arbitral proceedings in their territory and the state’s legal regime, and the idea that arbitral awards made in their territory should be considered national awards.”<sup>42</sup> The real problem is that most legal systems insist on keeping some measure of control over arbitrations conducted in their territory, in order to ensure that mandatory provisions of that law are applicable to arbitrations whose seat is in that country.<sup>43</sup> Thus, if the national law of the place where arbitration is taking place, requires that the arbitral tribunal should follow certain procedures, then the tribunal should comply with that law, otherwise its award could be challenged under the national public

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then why should the principle not extend to allowing them to empower the arbitrators to make the choice for them” A. J. Jaffy, *op. cit.*, p. 80; also see, Hans Smit, “A-national Arbitration,” (1988) 63 *Tul. L.Rev.*, p. 1311, who illustrates that the rules of procedure applied in international tribunals frequently do not follow the pattern of any national legal system. Instead, international arbitrators are developing a procedural system of their own; also see, *London Export Corporation Ltd v. Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, [1958] 1 WLR 661.

<sup>41</sup> W. Laurence Craig, “Some Trends and Developments in the Laws and Practice of International Commercial Arbitration,” *op. cit.*, p. 23.

<sup>42</sup> See in this regard *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros Del Peru*, [1988] 1 Lloyd’s Rep. 116 (CA.). The court found, at that time, that English law rejected the idea of a floating or delocalised arbitration and found that “every arbitration must have a ‘seat’ or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force.”

<sup>43</sup> National courts’ concern is that arbitrators must be bound to respect the mandatory national procedural rules of the forum.

policy rules of the forum. This may lead to the refusal to enforce the award in other countries under Article V (1)(e) of the New York Convention.<sup>44</sup>

The trend in international commercial arbitration is to allow the arbitral tribunal to enjoy more flexibility than that of a national court when choosing the applicable procedural rules.<sup>45</sup> There is a growing consensus among theorists and practitioners to free arbitrators from any local rules of procedure, in particular, from the procedural law of the country where the arbitration has its seat.<sup>46</sup>

As Lord Diplock said in *Bremer Vulkan v. South India Shipping Corp. Limited*:<sup>47</sup>

“The parties make the arbitrator the master of the procedure to be followed in the arbitration. Apart from a few statutory requirements under the Arbitration Acts . . . he has complete discretion to determine how the arbitration is to be conducted, from the time of his appointment, to the time of his award, as long as the procedure he adopts does not offend the rules of natural justice.”

The arbitrators’ power is derived from the arbitration agreement, and arbitrators are not state judges, therefore, they are not obliged to follow the procedural rules provided for

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<sup>44</sup> The objections that have been presented against the “Delocalisation theory”, based on the New York Convention, were challenged by Okezie Chukwumerije on the ground that: “the Convention should be read as requiring a geographical connection between the award and a particular jurisdiction, without demanding that such awards be governed by the national law of that jurisdiction”, Okezie Chukwumerije, *op. cit.*, p. 95; see also Rubino-Sammartano. M., *op. cit.*, p. 289.

<sup>45</sup> Article 19(2) of the Model Law (1985); Lawrence Collins, *op. cit.*, p. 133; Article 4(3) of The Washington Convention of 1965; Yves Derains, *op. cit.*, p. 232; See *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583.

<sup>46</sup> Jan Paulsson, “The Extent of Independence ...” Julian Lew ed., *op. cit.*, p. 141 at 148.

<sup>47</sup> *Bremer Vulkan v. South India Shipping Corp. Limited.* [1981] 1 Lloyd’s Rep. 253.

state judges of the state where they are sitting, especially if the parties, arbitrators and the dispute are not related to the place where the arbitration is to take place.<sup>48</sup>

One can reply to defenders of the 'seat theory', that there is no affront to the integrity of the national legal system, if parties or arbitrators decide to apply procedural rules different from the forum rules, because the procedural public policy rules of the place of arbitration will provide a safety net to ensure that the main principles of justice in the national legal system are upheld. It will always remain possible for a state to set the award aside or to refuse recognition and enforcement of an award if this award is contrary to public policy however that may be conceived in that state. Therefore, if the arbitral proceedings take place in a given state, arbitrators must not disregard the mandatory procedural rules of that state, as will be explained later in this chapter.

### **C. Parties' choice of substantive rules**

The substance of the dispute is a particularly sensitive area. The difficulty arises in international commercial arbitration since various national laws may be deemed applicable to the substance of the dispute due to international commercial relations often involving several foreign elements, which connect the dispute to different countries with different laws and rules.<sup>49</sup>

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<sup>48</sup> See *Bank Mellat v. Helliniki Techniki*, per Kerr L.J. Q.B. [1984], p.301; also in *Dallal v. Bank Mellat*, [1986] Q. B., p. 441; (1985) 1 All ER., p. 239, the High Court held that: "English law does not deny the possibility of applying a different curial law."; *Saudi Arabia v. Aramco*, International Law Reports (1963) 27 ILR 117; see also, Rubino-Sammartano. M., *op. cit.*, p. 283.

<sup>49</sup> G. Guedji Thomas, "Theory of the *Lois de Police* - A Functional Trend in Continental Private International Law (a Comparative Analysis with Modern American Theories)," 39 *AJIL* (1991), p. 660; Nathalie Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," *Am. Rev. Int'l Arb.* (1996) 7, p. 319; James Miller &



Generally, the parties' freedom to choose foreign laws to govern the substance of their dispute is subject to the courts' control in order to ensure that their agreement does not contravene the national mandatory rules.<sup>50</sup> However, the modern trend in international commercial arbitration tends towards liberating commercial arbitration from the control of national courts where the freedom of the parties to choose the applicable substantive rules has gained a considerable amount of respect. International entities and several legal systems have accepted the application of this concept.<sup>51</sup> For example, Article 28 of the Model Law (1985) provides that:<sup>52</sup>

"The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."

Article 17(1) of the ICC Rules (1998) provides that:<sup>53</sup>

"The parties shall be free to agree upon the rules to be applied by the arbitral tribunal to the merits of the dispute."

Section 46 (1) of the English law provides that:

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*Partners, Ltd. v. Whitworth Street Estates (Manchester), Ltd.*, [1970] AC 583, [1970]2 Weekly Law Report, p. 728(H.L.).

<sup>50</sup> Marc Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," (1997) 14 *J.Int.Arb.*, p. 23.

<sup>51</sup> It has been reported that: "Despite their differences, common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing parties to choose the law to govern their contractual relations". Okezie Chukwumerije, *op. cit.*, p. 108; Julian Lew, *op. cit.*, p. 75; Abu Zaid Redwan, *op. cit.*, p. 93; Ashraf al Rifaie, *op. cit.*, p. 217.

<sup>52</sup> See also, Article 33. (1) of the UNCITRAL Rules of (1976) providing that: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."

<sup>53</sup> See ICC Case No. 1512 /1971, Y. Comm. Arb., (1976), p. 128; *Clunet* 1974, at 905, S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards: 1974 -1985* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990) 3 at 4-5; See, Okezie Chukwumerije, *op. cit.*, p. 108.



“The arbitral tribunal shall decide the dispute- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or; (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.”

Article 39(1) of the Egyptian law provides that:

“The arbitral tribunal shall apply to the substance of the dispute the rules that have been agreed upon by the two parties.”

Parties to an international contract may sometimes agree to have their dispute governed by a particular national law or may choose to apply the customs and usage of international trade that are common to all or most of the states connected with the dispute<sup>54</sup> or international trade law (*lex mercatoria*).<sup>55</sup> The latter has been considered preferable by parties involved in international commercial arbitration, which may prefer to apply a special set of rules made in consideration of their needs. Businessmen dealing with international commercial relations need to apply a developed commercial law

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<sup>54</sup> This approach is in conformity with certain rules of arbitral institution such as ICC, since Article 13 (5) of the ICC Rules of 1988, which has been repeated in Article 17 (2) of the 1998 rules which provides that: “In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages”. See, ICC Award 6527/1991, Y. Comm. Arb., (1993), p. 45; ICC Award 4629/1989, Y. Comm. Arb., (1993), p. 11; ICC Award 6076/1989. Y. Comm. Arb., (1990), p. 83.

<sup>55</sup> Berthold Goldman defines the Lex Mercatoria rules as: “lex mercatoria is, at the least, a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a national system of law.” Berthold Goldman, “The applicable law: general principles of law - the *lex mercatoria*,” *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 116. He also considers lex mercatoria as the result of the rules and principles arising from various sources: from multinational systems, national legal systems and spontaneous sources, including the fundamental principle of international law and the principles which drive their binding nature from the knowledge of the international community rather than from a given national legal system; Julian Lew defines it as a “non-national or transnational commercial law which governs those aspects of international trade not regulated by some national law, and are applied by arbitrators.” Julian Lew, *Applicable Law in International Commercial Arbitration*, *op. cit.*, p. 532; Hans Smit, *op. cit.*, p. 629 at p. 632.

different in some measure from the state laws, which the courts would apply.<sup>56</sup> Awards based on the *lex mercatoria* are now placed on the same footing as awards rendered on the basis of domestic or international law rules in the sense that, in both cases, the courts will not sit in judgement as to what is the correct or incorrect construction by the arbitrator of the rules on which the award is based.<sup>57</sup>

Arbitrators are bound to apply the laws or rules that have been determined by the parties.<sup>58</sup> If the parties' intention is not clear or absent, then it is for the arbitral tribunal to decide the applicable rules in order to proceed with the arbitration and decide on the outcome of the dispute.

#### **D. Deciding the applicable substantive rules**

Deciding the applicable substantive rules, a matter for the arbitral tribunal, may stir up difficult problems. Considering that in international commercial relationships several legal systems may be applicable to the contract, and that these various legal systems may

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<sup>56</sup> B. Goldman provides that: "This is the case especially in international commercial contracts that deal with specific types of goods, where they prefer to apply rules derived from commercial usage or (*lex mercatoria*) of an international nature, which is or may be, different from the applicable national law. The '*lex mercatoria*' is precisely an assemblage of principles, institutions and rules from all sources, which have nourished and still do nourish the legal structures and the legal functioning specific to the collectivity of operators in international commerce." B. Goldman, *La Lex Mercatoria dans les Contrats et l'Arbitrage Internationale*. Translated from French by Wolfgang Peter, *op. cit.*, p. 94.

<sup>57</sup> Vanessa L.D. Wilkinson, "The New Lex Mercatoria Reality or Academic Fantasy?," 12 *J.Int.Arb.*, (1995), p. 103; Georges R. Delaume, *op. cit.*, p. 9.

<sup>58</sup> In ICC award Case No. 1581/1971, *ICC International Court of Arbitration Bulletin*, VI/1 (1995), p. 14. The award states that: "... the arbitral tribunal derives from the terms of reference the entire scope of its power and its competence and contrary to a State Court, is bound by the will of the parties where such parties are unanimous on the question."

treat the contract in different ways, the contractual relationships will differ according to the applicable legal system. In order to decide which substantive rules the arbitral tribunal may apply, the following questions will be examined:

1. Does the arbitral tribunal have a free choice in its search for the applicable law (as parties acting autonomously do), or should it first search for any indication of what could be considered as an implied choice by the parties?
2. If there is no indication of the parties' choice, then is it permissible for the arbitral tribunal to apply whatever system it deems appropriate in order to govern the dispute?

### **1. Searching for the tacit choice**

Parties may refer to arbitration without providing a clear intention as to which law or set of rules should govern their dispute. Nevertheless, there might be indications that would guide the arbitral tribunal in determining the applicable law.<sup>59</sup> It may be possible to infer the choice of law from the nature and terms of the parties' contract and the relevant surrounding circumstances.<sup>60</sup> Arbitrators may be guided by the parties' previous relationships and, in their absence, from current practice in the countries to which the

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<sup>59</sup> The law governing a contract could be inferred from the parties' intentions, whether they are expressed or implied. This was the view in *Sapphire Int. Petroleum Ltd. v National Iranian Oil Co.* (1967) *International Law Review*, p. 136; also see, the *Texaco* case (1979) *International Law Review*, p. 389; ICC Award 3572/1982, *Y. Comm. Arb.*, (1989), p. 111; ICC Award 4145/1984, *Y. Comm. Arb.*, (1987), p. 97.

<sup>60</sup> This can be established if it appears from the circumstances of the case that the contract has its most significant connection with the law of a particular country. See Dicey and Morris, *The*

contracting parties belong. They may also be guided by searching for a suitable solution that is as near as possible to the expectations of both parties.<sup>61</sup> In such circumstances arbitrators are bound to search first for such indications before they decide on the applicable rules by using their discretionary power.<sup>62</sup>

The most important factor used to determine the tacit choice of the parties is whether or not the parties have agreed to hold the arbitration in a particular country.<sup>63</sup> If so, this would be a strong indication to consider their ‘*choice of forum as choice of law*’.<sup>64</sup> According to this concept, the parties’ choice of country as the seat of their

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*Conflict of Laws*, 7<sup>th</sup> ed., Stevens, (1958); Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 122; See *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* (1987) A.C. 50.

<sup>61</sup> For example, if in the course of their pre-contractual negotiations the parties had held diametrically opposed points of view on the question of the applicable law, and for this reason did not specify such a law in their contract. Arbitrators in such circumstances may apply the law that best conforms to the parties’ legitimate expectations. See Yves Derains, *op. cit.*, p. 234. To the same extent this was the trend followed in Article 3 (1) of the Rome Convention (Convention on the Law Applicable to Contractual Obligations (19 Jun 1980)), which provides that: “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.”; Rubino-Sammartano. M., *op. cit.*, p. 275; Klaus Peter Berger, *op. cit.*, p. 691; Bernard Hanotiau, *op. cit.*, p. 397.

<sup>62</sup> In order to consider a tacit choice as a choice made by the parties, and therefore, binding on the tribunal, there should be a clear indication that it represents the genuine choice of the parties. See Julian Lew, *Applicable Law in International Commercial Arbitration*, *op. cit.*, p. 181; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 123; Ole Lando, “The law applicable to the merits ...”, *op. cit.*, p. 112; J. G. Collier, *op. cit.*, pp.185-188; Rubino-Sammartano. M., *op. cit.*, p. 256; Okezie Chukwumerije, *op. cit.*, p. 122; *Amin Rasheed Shipping Corporation v. Kuwait Insurance Company* (1984). E.C.R. 1351.

<sup>63</sup> Thomas, D. Rhidian, “Commercial Arbitration: Arbitration Agreements as a Signpost of The Proper Law,” [1984] *LMCLQ*, p. 141.

<sup>64</sup> English courts have held that an agreement to submit to the jurisdiction of the courts or to go to arbitration in a particular country is evidence of the intention to apply the law of that country. In most cases this has led to the application of English law. *NV Kwik Hoo Tong Handel Maatschappij v. James & Co. Ltd*, [1972] AC 604 HL; *Tzortzis v. Monark Line AB*, [1968] 1 WLR 406 CA. In the latter case, the choice of arbitration in London by a Greek and a Swedish party was considered to be a choice of English law; see also *Sojuznftexport v. Joc Oil Ltd*. (1990) Yearbook of Commercial Arbitration (1992), p. 384, in which it was agreed that all

arbitration will automatically involve the application of the domestic law of that country, which in practice should prevent the arbitrators from choosing a different law. This method of considering the choice of forum as the choice of law provides an easy solution. The English court of appeal in *Tzortzis v. Monark Line A/B* considered this solution as “irresistible” in deciding the law applicable to international contracts.<sup>65</sup> The court viewed the choice of England as the seat of arbitration as a factor indicating the choice of English law which “overrides all other factors”.

However, the application of this concept is not acceptable in all cases, especially if arbitration takes place in different countries, or if the choice of a specific forum is made for reasons unconnected with the law of that forum. For example, the parties may choose a country to be their forum for geographical convenience if it provides a suitable neutral venue especially if each party is sceptical about receiving fair treatment in the other state’s courts or about the reputation of the arbitration service to be found in that forum.<sup>66</sup> Moreover, the trend followed by international doctrines tends to detach international commercial arbitration from *the forum*, stating that “there is no *lex fori* to international arbitral tribunals”.<sup>67</sup>

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disputes were to be referred to arbitration in Moscow without specifying the proper law of the agreement, and in which the Bermuda Court decided that the Soviet law was the proper law to use in order to decide the scope of the agreement.

<sup>65</sup> In *Tzortzis v. Monark Line A/B* (1968) 1 All E.R. 949, also can be viewed in, 1 W.L.R. (1968) at 406.

<sup>66</sup> O Lando, *op. cit.*, p. 105; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 123; Rubino-Sammartano, M., *op. cit.*, p. 123; W. Michael Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration,” 38 *INT’L & COMP. L. Q.*, (1989), p. 26 at 42; Also see, *Compagnie d’Armement Maritime S.A. Appellants v. Compagnie Tunisienne de Navigation S.A. Respondents* (1971) A.C. 572.

<sup>67</sup> B. Stern, “Three Arbitrations, the Same Problem, Three Solutions,” *Rev. Arb.* 1957, p. 111, referring to the arbitrator in *Aramco* where he reached to the conclusion that: “the arbitral tribunal

Therefore, to consider a choice of forum as a tacit choice of law, there must be some relevant relationship between the arbitration and that forum.<sup>68</sup> For instance, if the parties choose an arbitration institution established in a particular country which is also the country where the contract has been or would have been performed, then it is likely that it will be considered that the tacit choice has been to apply the law of that country.<sup>69</sup>

## 2. Deciding which rules govern the substance of the dispute

The modern trends of international commercial conventions and rules of arbitration give considerable freedom to the arbitral tribunal to choose the rules that govern the substance of the dispute.<sup>70</sup> This trend has been reflected in the rules of various international commercial institutions and international conventions:

For example, Article 28(2) of the Model Law (1985) provides that:<sup>71</sup>

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has no *lex fori*"; Pierre Lalive, *Transnational (or Truly International) Public Policy op.cit.*, p. 271; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 125; Yves Derains, *op. cit.*, p. 232; Rubino-Sammartano. M., *op. cit.*, p. 258; Okezie Chukwumerije, *op. cit.*, p. 124; J. G. Collier, *op. cit.*, p. 17.

<sup>68</sup> Yves Derains, *op. cit.*, p. 231.

<sup>69</sup> Sometimes when parties select an arbitrator from a certain country and place the seat of arbitration in that same country, this may provide an indication that they expect him to apply the law of that country.

<sup>70</sup> The freedom of arbitrators to choose the rules that they consider appropriate was asserted in the award made in ICC Case No. 2735/1976, *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 301; *Journal du Droit International*, Clunet (1977), p. 947. Here the tribunal decided to apply French law as the proper law to govern the dispute; Paolo Contini, *op. cit.*, p. 283 at 290. However, there were objections to the freedom of arbitrators to apply the rules as they think fit on the grounds that this leads to uncertainty; A.J.E Jaffy, *op. cit.*, p. 78; also see, Rubino-Sammartano. M., *op. cit.*, p. 258; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 128.

<sup>71</sup> See also Article 33(1) of the "UNCITRAL" Arbitration Rules (1976).



“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.”

The same essential provision can be found in Article 17 (1) of the ICC Rules (1998), in which the word ‘appropriate’ is used.<sup>72</sup> Article 17 (1) of the ICC Rules provides that:<sup>73</sup>

“The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate”.

Several legal systems follow this trend, by giving arbitrators a free choice in deciding the applicable substantive rules according to what they may find appropriate and closely connected to the dispute. For example, this was the method followed in Article 39 (2)(3) and (4) of the Egyptian law of (1994) which provides that:

“(2)- if the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral tribunal shall apply the substantive rules of the law it considers closest to the dispute.

(3)- the arbitral tribunal, when adjudicating the merits of the dispute, shall decide in accordance with the terms of the contract in dispute and the usage of the trade applicable to the transaction.”

The English Arbitration Act of 1996 provides in Section 46 (3):<sup>74</sup>

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<sup>72</sup> The “Model Law” and the “UNCITRAL” uses ‘applicable’.

<sup>73</sup> See also Article 17 (2) of the ICC Rules which provide that “In all cases the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages”; also see Article 7 (1) of the European Convention on Commercial Arbitration (1961) which provides that: “... Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.”

<sup>74</sup> Also this was the trend before the 1996 Act. In *Deutsche Schachtbau und Tiefbohrergesellschaft mbH v. Ras Al-Khaimah National Oil Co*, [1988] 3 W.L.R. 230; [1988] 2 All E.R. 833; [1988] 2 Lloyd’s Rep. 293. The English court of appeal considered the validity of an agreement under which arbitrators had chosen the “international accepted principles of law governing contractual relationships”. Lord Donaldson held that: “By choosing to arbitrate under the rules of the ICC and in particular Article 13. (3), the parties have left the proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators’ choice of proper law – a common denominator of principles



“(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

The question here is: how can arbitrators determine the appropriate rules? One should consider here that the arbitrators have a duty to resolve the dispute and to provide the parties with an enforceable award, and must therefore determine the law that should govern the dispute. Therefore, they are required to search for links between the matter under arbitration and a particular legal system. This can be made by examining several relevant factors notably<sup>75</sup>, the place of business or habitual residence of the parties<sup>76</sup>, the place of contractual performance, the place of arbitration<sup>77</sup>, and even the nationality of the arbitrator.<sup>78</sup>

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underlying the laws of various nations governing contractual relations – is outside the scope of the choice which the parties left to the arbitrators”; also see, *James Miller & Partners, Ltd. v. Whitworth Street Estates (Manchester), Ltd.*, 1 All E. R. 796, 801-02, 809-10 (House of Lords Mar. 3, 1970).

<sup>75</sup> See Dicey and Morris, *The Conflict of Laws*, 11<sup>th</sup> ed., Stevens (1987) Vol. II, p. 1161. It has been stated that: “the term ‘proper law of a contract’ means the system of law by which the parties intended the contract to be performed, or where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.”

<sup>76</sup> The principal office and the habitual residence of the seller at the time in question, and the place of conclusion of sales contracts were considered in deciding the applicable law in ICC Award 6281/1989, *Y. Comm. Arb.*, (1990), p. 96; *Collection of ICC Arbitral Awards*, Volume III, 1991-1995, Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher, p. 409. Also, the place of performance of contract was considered in ICC Award 4650/1985, *Y. Comm. Arb.*, (1987), p. 110; ICC Award 5460/1987, *Y. Comm. Arb.*, (1988), p. 104; See, A. Rogers, "Contemporary Problems in International Commercial Arbitration," (1989) 17 *IBL*, p. 154 at 158; M. N. Howard, "Floating Choice of Law Clauses," (1995) *LMCLQ*, p. 1 at 5; Dicey and Morris, *The Conflict of Laws*, 8th ed., Stevens and Sons Ltd., (1967), p. 1048.

<sup>77</sup> See ICC Award 6268/1990, *Y. Comm. Arb.*, (1991), p. 119.

<sup>78</sup> However, applying the law of the country of which an arbitrator is a national was criticised as being less relevant in choosing the applicable law. See Rubino-Sammartano. M., *op. cit.*, p. 261.

Most frequently, arbitrators in international commercial arbitration apply the following systems for determining the applicable law:<sup>79</sup>

- a- Application of the rules of the forum;<sup>80</sup>
- b- Cumulative application of the legal systems of the countries that have close links with the dispute;<sup>81</sup>
- c- Application of the rules chosen directly by the arbitral tribunal, by directly selecting the applicable law that it may find the most relevant to the contract.<sup>82</sup>

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<sup>79</sup> In an arbitral award issued under the auspices of the Cairo Centre, (Arbitration case No. 95/1997, March 12, 1998, 1 *Journal of Arab Arbitration* (1999), p. 45). The tribunal relied on five different criteria to determine the applicable law: "When an issue of conflict of laws arises, the arbitral tribunal relies on five criteria in its endeavour to determine the applicable law, namely: the arbitration venue, the venue of signing the contract, the residence of the parties to the contract, the venue of executing the contract and the language of the contract or the language of the arbitration if they are different."

<sup>80</sup> See ICC Case No. 1598/1971, *Y. Comm. Arb.*, (1978), p. 216; S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards: 1974-1985*. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990), p. 167; See also ICC Case No. 1455/1967, *Y. Comm. Arb.*, (1978), p. 215; S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards: 1974-1985*. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1990), p. 167; S. Baker and M. Davis, *The "UNCITRAL" Arbitration Rules in Practice: The Experience of the Iran – United States Claims Tribunal* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, (1992), p. 127; Okezie Chukwumerije, *op. cit.*, p. 127; A.J.E. Jaffey, *op. cit.*, p. 79. However, the same criticism that has been addressed to the application of the forum's procedural rules (mentioned above), can be imposed on the application of the forum's substantial rules.

<sup>81</sup> This method can be used when there are competing sets of rules in conflict with each other, such as the conflict between rules of the parties' country of nationality or residence and the rules of the seat of arbitration; and that between the rules of the country where the contract is to be performed and the country where the award would be enforced). see Yves Derains, *op. cit.*, p. 233. This method was applied by the arbitral tribunal in ICC Case No. 953/1956, *Y. Comm. Arb.*, (1978), p. 214; see also, CC Award No 4434/ 1982, *Journal du Droit International* (1983), p. 893; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; ICC Award No 2886/1977, *Journal du Droit International* (1978), p. 996; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 332; ICC Award No 3235, reported in *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 410; *Journal du Droit International* (1981), p. 925; ICC Award No. 4434/1982, : *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; Okezie Chukwumerije, *op. cit.*, p. 128. The problem with this theory occurs when the dispute involves a conflict of rules which involves different substantial laws.

<sup>82</sup> Here arbitrators should weigh up the different criteria, on a case by case basis and their relative importance in relation to the centre of gravity of the contract. See Yves Derains, *op. cit.*, p. 236; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 305. He considers the tribunal's choice in determining the closest connection to the dispute, on the same

- d- Application of general principles of conflict of laws;<sup>83</sup>
- e- Applying the *lex mercatoria* rules<sup>84</sup>, which would meet with the requirements of international commerce.<sup>85</sup>

As previously stated, arbitrators are responsible for making an award that must have a legally valid basis in order to be enforced. Therefore, it is imperative to choose a legal system or set of rules, which are closely connected to the dispute<sup>86</sup>, and which also corresponds to the parties' legitimate expectations.<sup>87</sup> In order to accommodate these

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level as the autonomy of the will of the parties; Ole Lando, "The law applicable to the merits...", *op. cit.*, pp. 107 and p.133; also in this regard see, ICC Award No. 6281/1989, *Egyptian Co. v. Yugoslav Co.* Award (August 26, 1989), 15 Y. Comm. Arb., (1990), p. 96.

<sup>83</sup> This includes applying the law applicable to conflict of rules that is common to the majority of countries and which is accepted by most modern jurisdictions and international conventions, having become international commercial practice. See ICC Case No. 4650/1987, 12 Y. Comm. Arb., (1987), p. 110; ICC Case 6527/1991, Y. Comm. Arb., (1993), p. 44 at 46; ICC Award No 4434/ 1982, *Journal du Droit International* (1983), p. 893; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 458; ICC Award No 3880/1983, Y. Comm. Arb., (1985), p. 44; Okezie Chukwumerije, *op. cit.*, p. 129; Ole Lando, "The law applicable to the merits...", *op. cit.*, p. 109.

<sup>84</sup> One should consider that arbitrators might need authorisation from the parties, since otherwise arbitrators would be considered as acting as *aimable compositeurs*. Kluas Berger pointed to examples in Germany and Switzerland. See Klaus Peter Berger, *op. cit.*, p. 685. Notwithstanding that, Berger considers "the arbitrator's decision according to the rules of *lex mercatoria* as decisions made according to the law, not equity", at p. 686.

<sup>85</sup> Arbitrators may resort to the application of such rules and/ or usage where there are no efficient connecting factors as in cases where there is more than one place of execution and performance of the contract. See for example, ICC Award, Case No. 1375/65; ICC Award, Case No. 1859/73; ICC Award No 1675/1969, *Journal du Droit International* (1974), p. 895; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 197; see also, *Deutsche Schachtbau-und Tiefbohrergesellschaft GmbH (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil)*, [1987] 2 Lloyd's Rep. 246, which concerns the enforcement of an arbitral award which was based on *lex mercatoria*; See Berthold Goldman, Julian Lew ed., (1987), *op. cit.*, p. 117; Ole Lando, "The law applicable to the merits...", *op. cit.*, p. 107; Ole Lando, "The Lex Mercatoria in International Commercial Arbitration," *International and Comparative Law Quarterly*, 34 (1985), p. 747 at 768.

<sup>86</sup> *Compagnie d'Armement Maritime S.A. Appellants v. Compagnie Tunisienne de Navigation S.A. Respondents* (1971) A.C. 596.

<sup>87</sup> Yves Derains, *op. cit.*, p. 233; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 305.

different aims arbitrators should consider what the parties would have decided if they had considered the question of the law applicable to their contract, and arbitrators should also avoid the possibility of violating the public policy of countries closely connected to the dispute. Whilst the latter consideration is integral to creating an award which could be enforceable, arbitrators may encounter the problem of determining the extent to which public policy should be applied and which public policy rules are applicable particularly in situations where they are not acting according to the rules of a particular national law.<sup>88</sup> Accordingly parties or arbitrators have to select the law most appropriate to the needs of the arbitration and the merits of the dispute, in order to avoid as far as possible a decision to set the award aside because it has violated national public policy rules.

## **II. The Duty to Respect the Applicable Rules**

In general, arbitrators' duties can be divided into two categories: their duties towards the arbitrating parties, and their duties towards the applicable law.<sup>89</sup> The first category is of a contractual nature as it establishes the relationship between parties and arbitrators. The second category can be inferred from the duty of the arbitral tribunal as it assumes the role entrusted to a court of the state in resolving disputes. This accordingly imposes the duties of reaching a just decision between the parties and balancing the interests of the parties with the interests of the community or communities that would be

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<sup>88</sup> Gunther J. Horvath, *op. cit.*, p. 146.

<sup>89</sup> Julian D.M. Lew, "Determination of Arbitrators' Jurisdiction..." *op. cit.*, p. 73.

affected by the resulting award.<sup>90</sup> The latter duty could be discharged by considering the application of public policy rules, as illustrated below. However, it will be important firstly to scrutinise the nature of the duties of both parties and arbitrators, and then to examine the duty of the arbitral tribunal in considering the application of public policy rules.

### **A. Mutual obligations imposed by the arbitration agreement**

The relationship between parties and arbitrators is generally regarded as contractual in nature, and is recognised by several legal systems. In 'Common Law Jurisdictions', this relationship has been described as a 'contract for services'.<sup>91</sup> In 'Civil Law Jurisdictions' there are two tendencies: some consider the relationship as being a contractual relationship, while others consider that arbitrators are discharging a public task.<sup>92</sup> In Islamic Law and generally in Arab countries which apply the "Sharia" legal system, this relationship is considered as contractual, since the contract consists of an offer from one of the contracting parties and an acceptance from the other.<sup>93</sup> Accordingly,

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<sup>90</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 262. The writers provide here that there are two groups of duties imposed on arbitrators. These are; duties imposed by the agreement of the parties; and those imposed by the law such as the duty to act with due care the duty to act with diligence, the duty to act judicially and ethical duties.

<sup>91</sup> See Michael J. Mustill and Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2<sup>nd</sup> ed., Butterworths, London, (1989), p. 280; Rubino-Sammartano. M., *op. cit.*, p. 189.

<sup>92</sup> *Ibid.* p. 190.

<sup>93</sup> See, for example, Article 87 of the Jordanian Civil Law of 1985, where it defined contracts as: "The contract is a joining and consistence of the offer from one of the contracting parties with the acceptance from the other in a manner which proves the effect thereof on the object of the contract and the obligation of each party by what he is bound with to the other." See Hisham R.

an offer made by the parties to an arbitrator must meet with an acceptance of appointment by that arbitrator, as a condition of the institution and enforcement of the arbitration agreement.<sup>94</sup> As a consequence of their contractual relationship, both parties and arbitrators will have mutual obligations.

## 1. Duties of the parties

During the arbitration proceedings, parties are obliged to comply with the procedures of arbitration. For example, they are obliged to provide the tribunal with a document which can support their claims.<sup>95</sup> Parties are also obliged to enforce “partial awards” and “interim measures”, in order to help the arbitral tribunal to conduct the arbitration.<sup>96</sup> For example, if the arbitral tribunal ordered one of the parties to present a document held in his possession<sup>97</sup>, then that party must comply with that order.<sup>98</sup> Parties are also obliged to co-operate in good faith and not to aggravate an on-going arbitration<sup>99</sup>,

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Hashem, *The Civil Law Code of Moslem Jurisprudence*, (1990), Al- Tawfiq Printing Press, p. 13. (in English).

<sup>94</sup> Samir Saleh, *Commercial Arbitration in the Arab Middle East*, Graham and Trotman, London, 1984, at 21- 39.

<sup>95</sup> Article 23(1) of the Model Law (1985); Article 15 of the LCIA Rules of 1998; Article 30 of the Egyptian law of 1994; Section 40 of the English law of 1996.

<sup>96</sup> Article 17 of the Model Law (1985).

<sup>97</sup> Arbitrators can order parties to produce a particular document. See, Kenneth S Rokison, “The Sources and Limits of the Arbitrator’s Powers in England,” *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 95.

<sup>98</sup> For example, see Article 20 (5) of the ICC Rules of 1988; Section 40 (2)(a) of the English 1996 Act.

<sup>99</sup> *Bremer Vulkan v. South India Shipping Corp. Limited*. [1981] 1 Lloyd’s Rep. 253; (1981) A.C., p. 909. The court expressly provided that: “The parties were equally under an obligation to keep the procedure moving, both were under an obligation to apply to the arbitrator to prevent inordinate delay.”



and they must avoid acts which make enforcement more difficult.<sup>100</sup> They are also obliged to pay the cost of arbitration and arbitrators' fees, whether this is paid directly to the arbitrators or through an arbitral institution with a supervisory function.<sup>101</sup>

Parties are also obliged to comply with the public policy rules of the countries that are closely connected to the dispute. They are also required to choose rules or laws that do not contradict international public policy.

## **2. Duties of the arbitral tribunal**

In accordance with their contractual obligations, arbitrators have to respect the will of the parties as expressed in their arbitration agreement. They also have a duty to give the parties an equal opportunity to present their case<sup>102</sup>, and a duty to respect what the parties decide are the most suitable rules to govern their dispute. Where parties agree to apply a particular law to govern their dispute, arbitrators are obliged to enforce their agreement.<sup>103</sup> If they fail to make their choice according to the law that has been chosen by the parties, arbitrators will be deemed not to have carried out the task entrusted to

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<sup>100</sup> Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 63.

<sup>101</sup> Article 30 and 31 of the ICC Rules (1998); Section 59 of the English Law of 1996.

<sup>102</sup> Arbitrators must consider the need to secure quick arbitration procedures and they should avoid going through lengthy presentations of evidence, which will add to the cost and time of the arbitration. See, for example, Article 15 (2) of the ICC Rules (1998) which provides that: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."; Article 14 of the LCIA Rules; Article 18 of the Model Law. The right of the parties to have a fair chance to present their case will be handled in more detail later in Chapter Five, at p. 187.

<sup>103</sup> Section 46(1) of the English law (1996) provides that: "The arbitral tribunal shall decide the dispute – (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute".



them by the arbitration agreement.<sup>104</sup> This may affect the enforcement of the award since a party can challenge the arbitral award if the arbitral tribunal applied rules other than those chosen by the parties.<sup>105</sup> Therefore, arbitrators should keep in mind that disregarding the parties' choice might lead to a defective award.<sup>106</sup>

In spite of the arbitrators' obligation to apply the law chosen by the parties they are not completely barred from applying other rules to the dispute, particularly if the choice of the parties leads to a violation of public policy rules, and if by disregarding the parties choice arbitrators would avoid derogation of the public policy of other countries connected to the dispute.<sup>107</sup> The fact that the arbitrator can apply other rules to the dispute despite the parties' choice, reflects his duty towards the community that has a close connection with the dispute and in this respect he must take into account the applicability of public policy rules. Finally, one should say that, regardless of the argument which states that arbitrators are not public servants like national judges, and are not bound therefore by the same duties as a national judge, the fact that they have the duty to provide the parties with an enforceable award, should ensure that they address the applicable public policy rules.

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<sup>104</sup> Robert H. Smith, "An Inside View of the ICC Court," (1994) *Arb.Int.*, p. 53 at 58.

<sup>105</sup> For example, Article 33(d) of the Egyptian law (1994) provides, that the arbitral award may be nullified where it "failed to apply the law agreed upon by the parties to govern the subject matter in dispute". Also see, Article 36 (1)(a) of the Model Law; Article V (1) of the New York Convention.

<sup>106</sup> Okezie Chukwumerije, *op. cit.*, p. 80; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 100.

<sup>107</sup> In ICC Case No. 3267/1979, Y. Comm. Arb., (1982), p. 96. The arbitral tribunal concluded that, "It is a generally accepted principle of international arbitration that the first duty of the arbitrator, even if he is an *amiable compositeur*, is to apply the contract entered into between the parties, unless it is established that the clauses which are quoted to him are manifestly contrary to

## B. The duty of respecting public policy rules

As stated above, the duty of considering the applicability of public policy rules may originate in the arbitration agreement. In addition to their contractual duties, arbitrators' duties have another dimension, emanating from their duty to consider the interests of the parties along with the interests of the community or communities that are connected to the dispute.<sup>108</sup> They have to resolve the dispute between the parties by achieving justice and equity<sup>109</sup>, while at the same time they have to take into account factors which might be injurious to public policy.<sup>110</sup> Therefore, arbitrators must evaluate two sets of interests: those of the parties and those of the community, although ultimately they are always bound to give preference to the public interests.<sup>111</sup> Furthermore, arbitrators are required to act as an alternative to national courts. Therefore, because of the power allocated to them in this capacity, they should consider the applicable public policy rules of the countries that have the closest connection with the dispute, such as the country where the

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the real intention of the parties or that they break a principle of public policy which is generally admitted". Rubino-Sammartano. M., *op. cit.*, p. 216; Yves Derains, *op. cit.*, p. 230.

<sup>108</sup> Ole Lando, "The law applicable to the merits...", *op. cit.*, p. 107. He considers arbitrators as responsible for the legitimacy of their award, and states: "... the arbitrator has a double concern. As the servant of the parties he must persuade them and especially the losing party of the justice of his award. Furthermore, he must make sure that the award is enforceable in the country or the countries where enforcement may be sought"; Yves Derains, *op. cit.*, p. 233.

<sup>109</sup> See *Hagop Ardohalian v. Unifer International SA* (The "Elissar") [1984] 2 Lloyd's Law Reports 84 at pp 87, 87.

<sup>110</sup> Arbitrators are not authorised to take a decision contrary to an absolutely constraining law, particularly in matters concerning public order. See ICC Award 1677/1975, 3 *Y. Comm. Arb.*, (1978), p. 217; William W. Park, "National Legal Systems and Private Dispute Resolution", (1988) 82 *AJIL.*, p. 616.

<sup>111</sup> See A.J.E. Jaffey, *op. cit.*, p. 1.

arbitration proceedings are held<sup>112</sup>, or the country where the contract will be performed or enforcement of the arbitral award will take place. One should recognise however, that arbitrators are not the guardians of a specific national law as court judges are and they are not 'completely bound' to apply the public policy rules of a particular country. Accordingly, arbitrators are only expected to 'consider' the public policy rules of countries that are closely connected with the dispute.

Another source of this duty comes from the arbitrators' duty to protect the rules and customs of international trade. This is the view of Julian Lew<sup>113</sup>, for whom arbitrators are:

"... the guardians of the international commercial order: they must protect the rights of participants in international trade; give effect to the parties' respective obligations under the contract; imply the presence of commercial bona fides in every transaction; respect the customs followed in international trade practice and the rules developed in relevant international treaties; uphold the commonly accepted views of the international commercial community and policies expressed and adopted by appropriate international organisations; and the fundamental moral and ethical values which underlie every level of commercial activity."<sup>114</sup>

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<sup>112</sup> For example, it is necessary for arbitrators to consider to what extent the law of the place of arbitration applies when deciding the arbitrability and the validity of an arbitration agreement. See ICC Final award 6162/1990, *Y. Comm. Arb.*, (1992), p. 153; *Alsing Trading Co.Ltd. v. The Greek State* (1956) *International Law Review*, p. 633; *Sapphire Int.Petroleum Ltd. v. National Iranian Oil Co.* (1967) *International Law Review* 136; *BP v. Libyan Arab Republic* (1979) *ILR* 297; *Wintershall AG v. The Government of Qatar*, (1989) *International Legal Materials*, p. 798; also see, William W. Park, "The Lex Loci Arbitri...", *op. cit.*, p. 23.

<sup>113</sup> Julian DM Lew, *Applicable Law in International Commercial Arbitration*, *op. cit.*, 532; also see, Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," Julian Lew ed., (1987), *op. cit.*, pp. 67-68.

<sup>114</sup> See also, Geoffrey Beresford Hartwell, "The New York Convention of 1958. A Basis for a Supra National Code," *Internet address*: ([http://www.hartwell.demon.co.uk/nyc\\_asa.htm](http://www.hartwell.demon.co.uk/nyc_asa.htm)), p. 1. He holds that, "...arbitrators, even in an international context, have some overriding responsibility to the public interest or to the concept of public order"; Okezie Chukwumerije, *op. cit.*, p. 180. He states that, "... the integrity of international arbitration and its endurance as a viable alternative to litigation would seem to rest on arbitrators' continual respect for the public policy of states whose legitimate interests are implicated in arbitration disputes. Arbitrators therefore have to balance

By examining the dispute in this light, arbitrators will provide an award that is more likely to be recognised and enforced. This approach corresponds to the modern tendency followed in international commercial arbitration, where arbitrators are obliged to ensure the validity of their award.<sup>115</sup>

For example, Article 32 (2) of the LCIA Rules provides that:

“In all matters not expressly provided for in these rules, the court and the tribunal shall act in the spirit of these rules and shall make every reasonable effort to ensure that the award is legally enforceable.”

Article 35 of the ICC rules of (1998) provides that:<sup>116</sup>

“In all matters not expressly provided for in these rules, the court and the arbitral tribunal shall act in the spirit of these rules and shall make every effort to make sure that the award is enforceable at law”.

One can add here that the examination of the dispute by the arbitral tribunal could be considered a preliminary stage prior to inspection by the court, which may lead to more respect and confidence in international commercial arbitration.

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their respect for the autonomy of the parties’ will with the need to apply the mandatory provisions of laws that are relevant to the dispute.”

<sup>115</sup> Klaus Peter Berger, *op. cit.*, p. 673. He provided that arbitrators are always concerned about the effectiveness of their decision: “The arbitrator has at least a moral obligation to give the parties an award which can be expected to stand, both in the case of setting aside procedures and in the case of enforcement procedure, before national courts”; Karl-Heinz Bockstiegel, “Public Policy and Arbitrability,” *op. cit.*, p. 185, appears to concur and adds, “...the arbitrator should therefore make every effort possible to find out and respect also mandatory or at least public policy rules of countries where such court procedures might be expected.”; John Y. Gotanda, *op. cit.*, p. 100.

<sup>116</sup> The same was provided in Article 26 of the ICC Rules of 1988. For the application of this rule see ICC Case No. 5485/1987, reported in 14 Y. Comm. Arb., (1989), p. 156, 162; ICC Case No. 5505/1987, reported in 13 Y. Comm. Arb., (1988), p. 110, at 110, 112, which states, “In order to fulfil the obligation imposed by article 26 of the ICC rules the arbitrator should probably also deviate from the law chosen by the parties if it would appear that such a choice, if applied by the arbitral tribunal, could prevent that the award be implemented. The arbitrator must ensure that his award is ultimately enforceable.”

Having established these points, it is now necessary to analyse which public policy rules are applicable in international commercial arbitration.

### **C. The applicable public policy rules**

The arbitrator must take into account the rules of several legal systems in deciding the applicable public policy rules in international commercial arbitration. The process by which the arbitral tribunal determines the applicable public policy rules may be examined under two categories, these are:

- 1- The public policy of the law chosen by the parties.
- 2- The proper public policy rules.

#### **1. Public policy rules of the law chosen by the parties**

If an arbitration agreement includes a clear choice of law, then arbitrators will be required to apply that law, and thus the public policy behind that law.<sup>117</sup> The problem that may occur here is that parties may deliberately choose a particular law in order to avoid applying the mandatory rules of another law.<sup>118</sup> They may also make a “negative choice

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<sup>117</sup> In an award made in 1980 in ICC Case No. 3380/1980, Y. Comm. Arb., Vol. VII, (1982) p. 116. The arbitrators considered that a clause phrased, “...this Agreement shall be subject to and constructed in accordance with the laws in Syria” meant that “the contract is governed by and should be interpreted in accordance with Syrian law in its entirety without restriction.” Cited in Yves Derains, *op. cit.*, p. 240; see also ICC Case No. 2119/1978, *Journal du Droit International* (1979), p. 997; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 355.

<sup>118</sup> For example, if it appeared that by choosing a given law the parties had deliberately decided to take themselves outside the field of operation of another law, for instance, the law of the place of

of rules”, for example, by excluding some provisions of the applicable law, particularly the mandatory rules, which conflict with their private interests.<sup>119</sup> This problem emanates from the right of the parties to choose the applicable law which will govern their dispute even if that entails that the dispute will be governed by general principles of law or the *lex mercatoria*.<sup>120</sup> According to this freedom, it is argued that parties should also be allowed to exclude certain provisions of the applicable law that they do not consider appropriate to their transaction<sup>121</sup>, and that which conflict with their interests.<sup>122</sup> The arbitrator is faced here with a potential conflict of loyalties.<sup>123</sup> On the one hand, should

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performance of the contract or the law of the country where the enforcement of the contract is likely to take place. see *Paczy v. Haendler & Natermann* [1981]1 Lloyd’s Rep. 302 at pp. 307-308.

<sup>119</sup> Rubino-Sammartano. M., *op. cit.*, p. 274. He illustrates the negative choice of the parties and states that, “... ‘the negative choice of the parties’ means that the parties intended to avoid accepting provisions which they were not aware of in order to avoid finding themselves subject to unanticipated regulation.”

<sup>120</sup> Vanessa L.D. Wilkinson, *op. cit.*, p. 103.

<sup>121</sup> See, Arbitral Award in ICC Case No. 7528/1993 *reprinted in* 22 Yearbook Commercial Arbitration 125 (1997). The tribunal in this case distinguished between national and international arbitration when determining whether or not to consider the parties’ exclusion of a national mandatory rule. In this case the arbitration agreement stipulated that French law would be the governing law but made the proviso that French Law No. 75-134 of 1975 – the purpose of which was to protect the sub-contractor from the consequences of the contractor’s bankruptcy – was to be avoided. The tribunal noted that even in international arbitration the parties’ agreement should not be allowed to prevail over all mandatory rules of national laws and in all circumstances: some rules are so important to the economic or social welfare of the country that international arbitrators must enforce them irrespective of the contrary intent of the parties. However, the tribunal recognised in this case that, “while French Law No. 75-134 of 1975 has a mandatory character (*d’ordre public*) in domestic transactions, given the international character of the contract and its place of performance outside France, the parties intent to avoid the provisions of Law No. 75-134 of 1975 must be upheld.”

<sup>122</sup> Yves Derains, *op. cit.*, p. 235. He refers to the system of “... the incorporation of the law into the contract” where he emphasises that, “... the law applicable to the international contract has no mandatory effect except insofar as the will of the parties has given it that effect. This is the system known as ‘the incorporation’ of the law into the contract whereby the law is part of the contract and therefore has no greater or lesser value than its other provisions.”

<sup>123</sup> See in this regard Gerold Herrman, “Does the World Need Additional Uniform Legislation on Arbitration?,” 15(3) *Arb.Int.*, (1999), p. 173. He highlighted this conflict and considered that Article V (1)(d) of the New York Convention might lead to “an unacceptable dilemma.” Article V



arbitrators be loyal to the interests of the parties and thereby bind themselves to apply the rules that they prefer? On the other hand, should arbitrators submit to their duty to act as a court (to act in a *quasi-judicial* capacity), to protect the public interest if the exclusion of the mandatory rule would lead to a violation of such public interests?<sup>124</sup> The latter means that the arbitral tribunal will be obliged to examine the contract and make sure that the law which has been chosen by the parties is not injurious to the public policy of the country that has closest connections with the dispute.<sup>125</sup>

The freedom of the parties to exclude the applicable mandatory rules has been arguable, because if the parties choose a law to govern their relations, arbitrators have to apply that law as a whole together with its mandatory rules.<sup>126</sup> Moreover, parties and arbitrators are private individuals and do not have the power to exclude what the legislators consider to be important mandatory rules which have to be applied in all

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(1)(d) requires that the procedural rules should be in accordance with the parties' will, which may lead an arbitrator either to disregard such procedural stipulations and follow the mandatory local provisions, with the result that enforcement of the award may be refused under Article V (1)(d), or to comply with the stipulation, with the result that the award may be set aside on the grounds that it violates a mandatory local provision, in which case, by virtue of Article V (1)(e), its enforcement abroad could be refused.

<sup>124</sup> Berthold Goldman, Julian Lew ed., (1987), *op. cit.*, p. 116. In this regard he states that, "One may meet clauses that expressly exclude the application of every municipal law, and provide for the exclusive application of general principles and usages of international trade. In reality, such clauses cannot prevent the arbitrator (and possibly the judge) from referring, in some instances, to a municipal law: for example, where the validity of the consent to the contract or the personal capacity of one of the parties is challenged." See ICC Award, case No 1569/70.

<sup>125</sup> This trend was applied in ICC Case No. 1859 (1973) *Rev. Arb.* 122, in which the arbitral tribunal held that, "... since the contract must be performed in Lebanon, Syria, Jordan, it is a sure fact that the Lebanese importer was obliged to comply with the mandatory rules of the countries of importation and that the Japanese party cannot now claim that those rules cannot be raised against him". Cited in Okezie Chukwumerije, *op. cit.*, p. 189; also see, Daniel Hochstrasser, *op. cit.*, p. 73.

<sup>126</sup> Okezie Chukwumerije, *op. cit.*, p. 184, states that: "...when the parties have made an express choice of law, the arbitrator must apply that law, together with its mandatory rules. In most

cases.<sup>127</sup> Accordingly, there are limits to the principle of ‘parties’ autonomy’ even in international commercial arbitration<sup>128</sup>, where protecting the public interest takes precedence over private interests.<sup>129</sup> As guardians of the international commercial order<sup>130</sup>, arbitrators are thus required to disregard the clause in the parties’ agreement<sup>131</sup> which restricts the application of the public policy rules of the law that has a close connection to the dispute where these rules are part of the international public policy. This will be explained below.

## 2. Searching for proper public policy rules

One should distinguish here between searching for the proper public policy rules and deciding which law is the proper law governing the dispute, as the former comes

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awards in which the applicability of the mandatory rules of the law chosen by the parties arose, arbitrators applied those rules as a matter of fact.”

<sup>127</sup> Daniel Hochstrasser, *op. cit.*, p. 69; Okezie Chukwumerije, *op. cit.*, p. 187, “...justice is not always to be controlled by the individual as distinct from the community of which the individual is a part.”

<sup>128</sup> See, Rubino-Sammartano. M., *op. cit.*, p. 252. He states that: “Even the parties’ freedom of choice is not unlimited. In fact, if the choice of a given applicable law is the result of the joint attempt by the parties to avoid mandatory provisions which would otherwise be applicable, this choice is not valid, since it is an attempt to evade the law. This is generally referred as *fraude a la loi*”; see also, A.J.E. Jaffey *op. cit.*, p. 80.

<sup>129</sup> ICC award No. 1434/1975, : *Journal du Droit International* (1976), p. 978; : *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 263.

<sup>130</sup> See Klaus Peter Berger, *op. cit.*, p. 692. He states that: “... international arbitrators carry an enhanced responsibility towards the international legal community which is a major factor for the functioning of the international arbitral process as an effective and reliable dispute settlement mechanism.”

<sup>131</sup> However, see in this regard Pierre Lalive who believes that arbitrators are obliged to apply the public policy rules of the law chosen by the parties since the autonomy of the will should be considered as part of international public policy. Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 301-302.

after deciding which law is the appropriate law.<sup>132</sup> To illustrate the application of the proper public policy rules, we assume that the public policy rules of several legal systems which have a connection to the arbitration are at stake and that the task of the arbitrators is to decide which public policy rules should prevail. Searching for the proper public policy rules in this sense will generate a conflict of public policy rules of the different legal systems that are related to the dispute. The proper public policy rules in this sense are determined according to what arbitrators consider are most closely connected to the dispute.<sup>133</sup>

One should consider in this regard that Article V (2)(b) of the New York Convention does not provide a clear indication as to which public policy rules are to be applied. There is no reference to any particular legal system in the Convention, therefore, an arbitrator has the power to decide that a court in the country of enforcement may examine the award under the public policy rules of any legal system involved in the arbitration.<sup>134</sup> This imposes on arbitrators the duty to respect the relevant public policy rules as part of their duty to provide an enforceable award. If an arbitrator made a

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<sup>132</sup> However, exceptions may occur in international commercial arbitration, an award in ICC Case No. 4123 in 1983, Yearbook, Vol. X (1985), p. 49, where the arbitrator was dealing with a dispute regarding a contract that had to be performed by a party in Korea and another party in the EEC. He considered the question of the application to the contract of the Korean mandatory rules and the EEC before determining the law applicable to the contract. Cited in , Yves Derains, *op. cit.*, p. 245.

<sup>133</sup> This approach was followed by the European Convention on the Law Applicable to Contractual Obligations. Article 3(3) of the Convention provides that, "... the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract mandatory rules."

<sup>134</sup> Public policy rules of the country where enforcement of the award is taking place is commonly applicable by the courts in the country of enforcement, by virtue of being the public policy rules of their national legal system.

decision without considering the applicable public policy rules, he would be infringing the duty he is expected to respect and abide by. The question that follows is: which public policy rules is it most appropriate to apply?

There are several aspects of legal systems that have to be considered in this respect.

These are:

1. The public policy rules of the forum.
2. The public policy of the country (or countries) where enforcement is likely to take place.<sup>135</sup>
3. The public policy of other countries, where a close link exists between the case and that country and when there are grounds for applying that law (e.g. place of performance of the contract).<sup>136</sup>
4. The application of international public policy rules.

Each of these aspects of legal systems may relate to the dispute, as has been previously discussed. The first possibility for arbitrators is to examine the dispute according to the public policy rules of the *forum*, which may be explained in two ways.

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<sup>135</sup> It should be taken into account that assets in international commercial contracts are often distributed between different countries, and that an arbitrator may not be able to predict where the award will be enforced. However, once the facts are presented before the arbitrator, he may be able to envisage the probable place or places where the award might be enforced. However, there is a debate about the duty of arbitrators to consider such rules. See, Bernard Hanotiau, *op. cit.*, p. 398. He states that, "... a majority of arbitrators consider that there is no 'moral duty' to apply the foreign rules of public policy of the place where the award could be enforced". Also see the decision of the Federal District Court Eastern District of New York, of 29 March 1991, (760 F Supp. (1991) 1036, Yearbook International Commercial Arbitration (1992) at p. 686.), in which the court refused to rely on the public policy of the law in the country where the enforcement of the award would take place.

<sup>136</sup> See Yves Derains, *op. cit.*, pp. 252 and 249.

Firstly, it is due to the possibility of setting the award aside by the court of the forum under the ground of public policy rules, which might accordingly effect the enforcement of the award in other countries under Article V (1)(e) of the New York Convention. Secondly, it is due to the arbitrator's duty to undertake the role of the courts of that country in resolving disputes.<sup>137</sup> Accordingly, an arbitrator will be obliged to apply the same rules as a national court of *the forum*.<sup>138</sup> Thus, if an arbitrator acknowledges that the substance of the dispute or the applicable rules contravenes the public policy of *the forum*, he will be bound to apply what a national court of *the forum* would apply. A national court will apply its national law.<sup>139</sup> It seems then that examining the legitimacy of an issue under the concept of public policy must be established upon the forum's own public policy rules.<sup>140</sup>

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<sup>137</sup> Rene David, *op. cit.*, p. 56.

<sup>138</sup> In ICC Award 5505/1987. *Y. Comm. Arb.*, (1988), p. 110. The choice of Switzerland as the place of arbitration implied the application of the Swiss mandatory provisions.

<sup>139</sup> See Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," *op. cit.*, p. 61; Lawrence Collins, *op. cit.*, p. 126 at 137. He states that, "It has been the policy of English law that arbitrators are subject to English law"; A. J. E. Jaffey, *op. cit.*, p. 88. He states: "If during the arbitration, the courts of the country in which the arbitration is held actually make an order that the arbitrators should apply a particular law, they must comply, for being present in the country when they act, they must obey the orders of its courts...they must regard themselves as bound by any rules of that country directing them which law to apply"; Yves Derains, *op. cit.*, p. 242, states that: "The mandatory rules of the forum have a natural priority which the judge has to apply, whatever the proper law of the contract"; see *Orion Compania de Seguros v. Belfort* (1962) 2 Lloyd's Rep 257; *Rsler v. Rottwinkel* (E.C.J.) Q.B. [1986] 53, the court held that: "Such legal rules include mandatory provisions which must be observed in deciding the dispute, regardless of the law governing the contract, and which are therefore in the nature of public policy."

<sup>140</sup> This has been asserted by the Egyptian Courts in Case No. 521 (1944), *Collection of Court of Cassation* (29), p. 472; see also, Ashraf al Rifaie, *op. cit.*, p. 20; Jonathan Hill, *International Commercial Disputes*, 2ed, London: LLP, (1998), p. 640. He states that: "...the principle of party autonomy must be subordinate to the public interest of the country in which the seat of arbitration is located. Since the law of the seat has a legitimate interest in ensuring that the arbitral process meets certain basic standards of justice and fairness, the parties to an arbitration cannot be entitled to exclude procedural rules which are mandatory according to the law of the seat."



However, as previously mentioned in this chapter, the “*seat theory*” has been criticised on the ground that it is not necessary to have a connection between the arbitration and the forum, especially where this choice was merely a place in which to hold the arbitration proceedings.<sup>141</sup> Therefore, it seems inappropriate to apply the public policy rules of *the forum*.<sup>142</sup> Okezie Chukwumerije, clearly illustrates this point:<sup>143</sup>

“Unlike national courts, international arbitrator tribunals do not owe strict allegiance to the laws of the place of arbitration ... an arbitral tribunal could decide to conduct the arbitration proceedings in different countries, in which case it is unrealistic to categorise the stringent public policy of *the forum* as applicable to the merits of the dispute. Even in cases where the proceedings are held in one country, international arbitrators still do not, as a theoretical matter, owe strict allegiance to the laws of that seat, in the sense that they are not constrained to apply all the imperative rules of *the forum* in the same way that national courts are.”

One should bear in mind though, that in practice arbitrators cannot act without considering the public policy rules of the forum. Article V (1)(d) of the New York Convention incorporates this idea, that non-observance of the procedural rules of the forum would be considered as a ground on which to refuse enforcement of the award.

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<sup>141</sup> A forum can be completely foreign to the arbitration, especially if the forum was not the place where the contract made and where it should be performed; or neither parties nor arbitrators have the nationality of *the forum*; or the applicable rules to govern the procedures and the substance of the dispute were foreign laws.

<sup>142</sup> See Yves Derains, *op. cit.*, p. 243. He states that: “... The international arbitrator does not go into the question of the application of mandatory rules in the same way as the judge. He takes no account of the distinction between the mandatory rules of the forum and foreign mandatory rules. He can only take account of the distinction between mandatory rules of the *lex contractus* and mandatory rules of another legal system.”

<sup>143</sup> Okezie Chukwumerije, *op. cit.*, p. 182; see also A.J.E. Jaffey, *op. cit.*, p. 81, who states that according to the English conflict of law rules, arbitrators are bound to apply English domestic public policy, unless if the dispute is outside the English court jurisdiction. He writes that: “... when the English court would not have had jurisdiction to try the dispute, in the absence of the agreement of the parties, England may have been chosen as the place of arbitration precisely because neither party belonged to it. In such a case English conflict rules, even those providing for the application of mandatory rules, have no claim to be applied, so that the question of their being avoided does not arise”; also see, Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 271.



Accordingly, arbitrators cannot wholly disregard the public policy rules of the forum<sup>144</sup>, whether they are embodied in the procedural public policy rules or in the substantial rules of the forum. For example, if a given country considers a particular issue an offensive violation of their highest social values and principles, then any arbitration proceedings

which take place in its territory will be considered as null and void, even if the enforcement of the arbitral award would be performed in another country which considers such agreements valid.

Arbitrators are also expected to take account of the public policy rules of the countries that are closely connected to the dispute as long as their interests are affected directly or indirectly by the dispute<sup>145</sup>, especially if the transaction conceals an illegal act, which is severely injurious to the public policy of such countries.<sup>146</sup> For example, if the

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<sup>144</sup> Public policy rules of the forum should be considered as long as they relate to the facts and circumstances of the case, thus demonstrating that the disputed matters in the arbitration are most clearly related to that law. See ICC Case No. 2178 (1973); AJE Jaffey, *op. cit.*, p. 27, referring to *Kaufman v. Garson* [1904] 1 K.B. 591.

<sup>145</sup> See A.J.E. Jaffey *op. cit.*, p. 90. He states that: "Arbitrators in international commercial arbitration are under some sort of duty to apply the international public policy rules of countries closely connected with the contract, even though they do not regard themselves as bound to apply any country's conflict rules, and even if they are applying the *lex mercatoria*"; See *Regazzoni v. K.C. Sethia* (1957) 3 All ER p. 286. In which the contract was held to be null and void because Indian law did not allow the trade of jute with South Africa, because of apartheid practised by that country. The Indian legal system was applied to the sale even though it was not the designed law to govern the dispute or the forum, but merely the law of a third country. See, Okezie Chukwumerije, *op. cit.*, p. 183, who states: "...Arbitrators have a responsibility to apply the mandatory rules of those jurisdictions whose national interests are substantially involved in the matter under arbitration"; See ICC Case No. 2930/1982, Y. Comm. Arb., Vol. IX (1984), p. 105; ICC Case No. 4123/1983, Yearbook, Vol. X (1985), p. 49; See Yves Derains, *op. cit.*, p. 245.

<sup>146</sup> ICC Case No. 1782/1973, *Journal du Droit International* (1975), p. 923; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 230. This case concerned the refusal of agreement by the authorities of the place of performance of a contract which was subject to another law; also see, ICC Case No. 2216/1974, *Journal du Droit International* (1975), p. 917; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 225.

dispute concerns acts, which would threaten the social security of another country<sup>147</sup>, then arbitrators should consider the public policy of that country.<sup>148</sup> In this regard, mention should be made of the significant Articles provided in the European Convention of 1980<sup>149</sup>, which gave considerable consideration to the conflict of public policy rules, where Articles 3(3)<sup>150</sup>, Article 7 and Article 16 provide guiding rules for deciding on the applicable public policy rules.

Article 7 provides that:

“In the application of this convention effect may be given to the mandatory rules of any state with which the situation has significant connection, if and in so far as, under the law of that state, those rules must be applied whatever the law applicable to the contract.”<sup>151</sup>

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<sup>147</sup> See ICC award Case No. 2136/1974, *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 456. A dispute involving problems of performance of licence granted by a German firm to a Spanish firm. Based on lack of authorisation by a mandatory rule of the place of performance, the tribunal held that: “Even though the licence contract would have been subject to German law, the consequences of a failure to obtain authorisation must be examined according to Spanish law”; See the Crete Rubles’ case in *De Wutz v. Hendricks* (1824) 2 Bing. 314; *Regazzoni v. K.C. Sethia* (1944) Ltd. (1958) A.C. 301.(1956) Q. B. p. 490; J. G. Collier, *op. cit.*, p. 211.

<sup>148</sup> Okezie Chukwumerije, *op. cit.*, p. 185, states that: “The tribunal might have to balance the interests of other countries that are equally connected with the transaction. The tribunal’s objective should be to determine which of them has a greater claim to the application of its mandatory rules by virtue of its connection with the dispute.”

<sup>149</sup> The Convention on the Law Applicable to Contractual Obligations, the Rome Convention (1980), was concluded between the member states of the European Community. This Convention was designed to achieve harmonisation of the relevant conflict rules of the member states and was said to be a logical and necessary consequence of the Brussels Convention of (1968) on Jurisdiction and Judgements in Civil Commercial Matters. It has also been argued that it introduces certainty into the rules of the conflict of the laws. However, the convention does not apply to arbitration agreements, see Article 1(2)(d); J. G. Collier, *op. cit.*, p. 182.

<sup>150</sup> Article 3(3) of the Convention provides that: “the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract mandatory rules.”

<sup>151</sup> See J. G. Collier, *op. cit.*, p. 211. He states that this article “...allows the court to give effect to the mandatory rules of another country with which the situation has a close connection if and in so far as, under the law of the latter country, these rules must be applied”. However, this provision has not been enacted into United Kingdom law; See, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 100.

Article 16 provides that:

“The application of a rule of law of any country specified by this convention may be refused only if such application is manifestly contrary to public policy.”

An arbitrator is also required to consider the public policy of the country where the parties are likely to seek enforcement of the award and to ensure that his award is ultimately enforceable, by making sure that his award does not contravene the national public policy rules of that country.<sup>152</sup>

However, applying these rules exclusively might not be sufficient to ensure the enforceability of the arbitral award since applying domestic mandatory rules to some questions and foreign mandatory rules to others presents considerable difficulties. Moreover, arbitrators cannot investigate every public policy rule contained in various legal systems as they are not expected to “scientifically investigate” the public policy rules of different legal systems<sup>153</sup> and they do not have the time nor the knowledge to do so. It would be more rational if it were expected from arbitrators to base their test, when determining which public policy rules apply to international commercial arbitration, on more suitable grounds, rather than blindly searching through the diversity of several legal systems for the applicable public policy rule. Thus, one could reach the conclusion that it

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<sup>152</sup> Julian D.M Lew, *Applicable Law in International Commercial Arbitration*, (1978), *op. cit.*, p. 537; Mohammad Reza Baniassadi, “Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?” (1992) 10 *INT’L TAX & BUS. L.J.* 59, p. 81; John Y. Gotanda, *op. cit.*, p. 103, fn. 216.

<sup>153</sup> It was noted in ICC Award 4695/1984, *Y. Comm. Arb.*, (1986), p. 149, that if a tribunal declined to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all.

would be more rational if arbitrators were to consider the application of internationally accepted public policy rules as the most appropriate public policy rules to govern international commercial relations.<sup>154</sup>

#### **D. Applying the international public policy rules**

Applying the international public policy rules in international commercial relations will provide arbitrators with a suitable way of avoiding the problems which may arise from the conflict of public policy rules.<sup>155</sup> There are several reasons for this. Firstly, international arbitrators are in a better position than national judges to understand the specific needs of international commerce, which is one of the reasons that drives parties to resort to international commercial arbitration. Secondly, international arbitrators do not have conflict of rules of their own or any particular concept of national “public policy”. Moreover, arbitrators are not expected to comply with national standards of public policy, especially where the national rules in question were designed to govern domestic relations only.<sup>156</sup> This approach was followed in a decision made under the ICC Rules.<sup>157</sup> In a case between an Italian and a Belgian party (in which Italian law was the governing

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<sup>154</sup> In ICC Case 8891(unpublished). Cited in, *ILA Report*, London Conference (2000), *op. cit.*, p. 23, in which “... the tribunal itself raised the issue of illicit commissions and invited submissions, and noted in its award that the illicit character of contracts for the payment of bribes was well established in arbitral jurisprudence and that arbitrators may properly base their decisions in such matters on general principles of law or transnational public order.”

<sup>155</sup> Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 287.

<sup>156</sup> Arbitrators should comply with the narrower, and less constraining, standards of international public policy rather than with the broader test of domestic public policy. See, Pieter Sanders, “Commentary on “UNCITRAL” Arbitration Rules,” 2 *Y.B. COM. ARB.* (1977), p. 172.

<sup>157</sup> See ICC Case No. 6379/1990, 17 *Y. Comm. Arb.*, (1992), p. 212- 218; Okezie Chukwumerije, *op. cit.*, p. 191.

law), the arbitrator refused to apply a Belgian mandatory rule because it "... does not aim at binding the international arbitrator".<sup>158</sup>

Applying international public policy rules also serves as a remedy in situations where parties expressly exclude the mandatory rules of the law of their choice. Not giving effect to the parties' intentions as such should not be considered as tantamount to disregarding the parties' choice provided that arbitrators based their decision on the grounds that such exclusion would violate a truly international public policy rule.<sup>159</sup> For example, in cases such as corruption<sup>160</sup>, or if the parties have chosen a law the application of which establishes racial discrimination against one of the parties.<sup>161</sup> Whilst the parties are precluded from excluding mandatory rules of the law applicable to the dispute, an arbitrator conversely may exclude the application of a mandatory rule although provided by the proper law, if it is incompatible with truly international public policy.<sup>162</sup>

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<sup>158</sup> The arbitrator found that the rule was designed for application by Belgian courts.

<sup>159</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 304. He states that: "... what can be, and indeed should be admitted, it is submitted, is not only the freedom of the international arbitrator but also the *duty* to disregard the choice of the parties, if this is required by a really international or transnational public policy. This is both a logical, advisable and inevitable transposition, to the domain of international arbitration, of the relationship which, in domestic private international law, exists between the normally applicable law and international public policy (of the State)."

<sup>160</sup> For more information see Chapter Six, at p. 242.

<sup>161</sup> Yves Derains, *op. cit.*, p. 251, "... An arbitrator should not agree to be an accomplice in a deliberate fraud on a mandatory rule that the arbitrator considers has an undisputed right to be applied"; Hisham Sadik, *op. cit.*, p. 317. He states that: "International public policy must be imposed on both parties and arbitrators. As for the parties, they will not get an enforceable award if its subject includes a matter which is contrary to public policy, such as, a violation of moral values, drug smuggling, terrorist acts, corruption, etc. As for the arbitrator, he will be considered as committing a violation of international public policy if he accept such conduct."

<sup>162</sup> See for example ICC Award, Case No. 7063/1993 *reprinted in* 22 Yearbook Commercial Arbitration 87 (1997). The defendant argued that pursuant to the doctrine of *riba* embodied in Saudi law, the claimant is not entitled to interest on any arbitration award. The tribunal held that

As stated above, for practical considerations international commercial arbitrators are required to consider the application of the public policy rules of the countries that have a nexus with the arbitration. The forum, the place or places where enforcement may take place, the public policy of the law chosen by the parties and the public policy of the place where performance of the contract will take place<sup>163</sup> all have to be respected as long as, in the view of the tribunal, these laws have a serious right to be applied.<sup>164</sup> However, the application of these rules does not mean that arbitrators are obliged to apply purely domestic public policy rules to international relations. Arbitrators must ascertain the public policy rules that a national law considers essential to the protection of its national interests and moral values, those which cannot be derogated by any other rule. Also, when such laws require the application of their public policy rules to both national and international commercial relations, this could be treated as constituting an international public policy rule for that country.<sup>165</sup> This has been illustrated in an ICC award, where the tribunal held that:<sup>166</sup>

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the doctrine of *riba* does not bar all awards of compensation for financial loss due to a party who has not had the use of a sum of money to which they would have otherwise been entitled.

<sup>163</sup> See *Ralli Brothers v. Compania Naviera Sota y Aznar*, (1920) 2 K.B. 287 C. A.; J. G. Collier, *op. cit.*, p. 212; Klaus Peter Berger, *op. cit.*, p. 689.

<sup>164</sup> This, for example, was followed in the ICC award rendered in 1973 in Case No. 1859. The arbitrators in this case decided to combine the application of national rules concerning the general principles and customs of international trade and the policy laws of the states where the contract was carried out. See, Yves Derains, *op. cit.*, p. 252.

<sup>165</sup> Daniel Hochstrasser, *op. cit.*, p. 61. He referred to Werner Wenger, *Die Internationale Schiedsgerichtsbarkeit*, in *Basler Juristische Mitteilungen*, 1989, pp. 337, 353 and 354., where he states: "Towards the law declared applicable by the parties or the arbitral tribunal, a public policy reservation exists: the arbitral tribunal has to respect fundamental principles of law which are valid in the sense of a transnational public policy, independent of the relation of the facts of the case to a special state. Furthermore, the arbitral tribunal has to respect the international public policy of such third countries (countries other than the one whose law is applicable) who have a close connection to the matter."



“arbitrators are not bound to apply such rules in the same strict manner at some state courts.”

In the following chapters several judicial decisions which concern the concept of international public policy in the enforcement of foreign arbitral awards, will be reviewed. In the next chapter the application of public policy rules by national courts in the country of origin will be examined.

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<sup>166</sup> ICC Award No. 1434/1975,: *Journal du Droit International* (1976), p. 978; *Collection of ICC Arbitral Awards*, Volume I, 1974-1985, Sigvard Jarvin & Yves Derains, p. 263; Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 300, footnote (121).

**CHAPTER FOUR**  
**PUBLIC POLICY AS A GROUND FOR SETTING ASIDE**  
**INTERNATIONAL ARBITRAL AWARDS**

## Chapter Four

### Public Policy as a Ground for Setting Aside International Arbitral Awards

In this chapter, various questions need to be answered. The first concerns the finality of international arbitral awards: whether an arbitral award should be considered to be a final decision on the dispute and therefore beyond the control of the courts in the country of origin, or that it must be subject to courts' control in that country. The second question concerns the extent of control that can be exercised by the courts in the country of origin over international arbitral awards and whether or not invoking public policy would lead to widening the grounds for control. This requires firstly examination of the conflict between the finality of arbitral awards and the courts' control.<sup>1</sup> Then one must determine the extent of applying public policy as a ground of setting the award aside. The latter requires consideration of the distinction between domestic and international arbitral awards, and whether or not arbitral awards should be treated similarly under the concept of public policy regardless of which of the two categories they fall under. Finally, it is important to examine the effect of setting aside an international arbitral award for considerations of public policy in the country of origin, when enforcement is to take place in other countries. This is important because setting the award aside in the country

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<sup>1</sup> See W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, Duke University Press, (1992) pp. 1-10. He explains this tension by stating that: "The interest of finality means that an arbitrary limit for control systems must be established. The interest of justice means simply that justice must be done no matter what the cost nor how long it takes"; David L. Shapiro (Directing Editor), *International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes*, (1997) The Foundation Press, INC, p. 965.

of origin is one of the grounds for refusing enforcement in foreign countries under Article V (1)(e) of the New York Convention.

## **I. Finality of the Award and Court's Control**

After making the final arbitral award the arbitral tribunal's mission comes to an end. Then, the question of how the award will be enforced will depend on the losing party's conduct. He may either submit to the award by executing it voluntarily, or he may resist the award by raising an action to set the award aside.<sup>2</sup> The latter contradicts the modern trend, which calls for considering the award to be final and binding on the parties from the day when it is decreed.<sup>3</sup> This is mainly due to the nature of the arbitration agreement, in that it is founded as a result of the parties' autonomous consent and therefore parties are obliged by their agreement to consider the resulting award as binding on them.<sup>4</sup> Moreover, most of modern national arbitration laws and rules of international arbitration institutions consider arbitral awards to be final and binding on the parties once it is issued. For example, Section 58 (1) of the English Act of 1996<sup>5</sup>; Article 55 of the

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<sup>2</sup> See above, Chapter One, p. 29.

<sup>3</sup> Henry P. De Vries, *op. cit.*, p. 47.

<sup>4</sup> Clive M Schmittoff, "Finality of arbitral awards and judicial review," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1987), p. 230.

<sup>5</sup> Section 58 (1) of the English Act of 1996 states that: "Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them." See, *Gbangbola v Smith and Sherriff Ltd* [1998] 3 All ER 730, at 738; *Westacre Investments Inc v. Jugoinport SPDR Holding Co Ltd*, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

Egyptian law of 1994<sup>6</sup>; Article 35 (1) of the Model Law<sup>7</sup>; Article 26 (9) of the LCIA Rules<sup>8</sup>; Article 28 (6) of the ICC Rules; Article 32 (2) of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).<sup>9</sup>

However, in spite of such provisions, most national arbitration laws impose some measure of control on the arbitral award, exercisable by state courts at the seat of arbitration. Accordingly, a party who is not satisfied with an award can protest against the award before the court of the seat of arbitration, where he may use whatever legal grounds are available including public policy, in order to disrupt the finality of the award and delay its enforcement.

#### **A. The conflict between finality of the award and the court's control**

The conflict between the finality of arbitral awards and the control exercised by state courts can be demonstrated by analysing two conflicting schools of thought. On the one hand some scholars argue that international arbitration is 'delocalised'<sup>10</sup> from the

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<sup>6</sup> Article 55 of the Egyptian Law No. 27 of 1994 provides that: "Arbitral award rendered in accordance with the provisions of this law shall have the authority of *res judicata* and shall be enforceable in conformity with the provision of the present law"; See Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 41.

<sup>7</sup> Article 35 (1) of the Model Law: "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

<sup>8</sup> Article 26 (9) of the LCIA Rules: "All awards shall be final and binding on the parties."

<sup>9</sup> Article 32 (2) of the (CRCICA) states that: "The award shall be made in writing and shall be final and binding to the parties. The parties undertake to carry out the award without delay."

<sup>10</sup> To delocalised an arbitral award means "to remove the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity". See Jan Paulsson, "The Extent of Independence...", Julian Lew ed., *op. cit.*, p. 141.

country of origin and an arbitral award constitutes a definitive ruling on the dispute, which does not require to be dealt with by another forum.<sup>11</sup> On the other hand many scholars believe that international commercial arbitration must be controlled by national legal systems.<sup>12</sup>

The advocates of the first trend base their argument on the purpose of resorting to arbitration. Parties engaged in international commerce resort to arbitration because they want a binding decision of the kind that would be given by a court. By going to arbitration they expect to settle their dispute with a minimum court control.<sup>13</sup> Therefore, adding layers of control imposed by the courts of the seat will increase time and costs, which do not serve the interests of the parties. Reisman explains this by stating that,<sup>14</sup> “a delayed victory may deprive the winner of substantial economic value.” Moreover, the cost generated by control systems is imposed not only on the parties but also on the community that funds the control system. Reisman reached the conclusion that, “...national courts would impose costs on the functioning of international commercial arbitration that could price it out of business.” This is also the view of Jan Paulsson<sup>15</sup>,

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<sup>11</sup> Jan Paulsson, “Delocalisation of International Commercial Arbitration: When and Why It Matters,” 32 *INTL & COMP. L. Q.* 53 (1983); W. Michael Reisman, *op. cit.*, pp. 1-10.

<sup>12</sup> Bruno Laurent, “Reflection on the International Effectiveness of Arbitration Awards,” 12:3 *Arb.Int.*, (1996), p. 269-285; Hong-Lin Yu, “Defective Awards must be Challenged in the Courts of the Seat of the Arbitration – A Step Further than Localisation?,” 65:3 *The Journal of the Chartered Institute of Arbitrators* (1999), p. 195 at 202; Jonathan Hill, *op. cit.*, p. 640; also see, *Japan Line Ltd v Aggeliki* [1980] 1 Lloyd’s Rep 288. Lord Denning stated, “... the court has, as well as its statutory powers, an inherent jurisdiction to supervise the conduct of an arbitral tribunal.”; *Minmetals Germany GmbH v. Ferco Steel Ltd*, [1999] 1 All E.R. 315.

<sup>13</sup> Henry P. De Vries, *op. cit.*, p. 47.

<sup>14</sup> W. Michael Reisman, *op. cit.*, p. 3.

<sup>15</sup> Jan Paulsson, “Delocalisation of international Commercial Arbitration...”, *op. cit.*, p. 53.



who states that, "If the international currency of awards depended ineluctably on their treatment in the hands of local magistrates in their countries of origin, the hopes for a more open and more universal system of international arbitration would be disappointed". In his reply to the opponents of 'delocalised arbitration' he affirms that although delocalised awards are independent of the legal order of their country of origin, they are not independent of all legal order, since they are still subject to the control of the court in the country of enforcement.<sup>16</sup> Therefore, he prefers to leave the control over the award in the hands of the courts of the country in which enforcement is sought, and he considers this a sufficient control for international commercial arbitration.

Contrary to this trend, many scholars believe that international arbitration requires control by the national legal systems of the country in which arbitration takes place, as this reduces the possibility of having any effect on the public interest of the country of origin.<sup>17</sup> The defenders of this trend argue that finality of the award is based on the assessment of what would be in the interests of the winning party.<sup>18</sup> However, it is more important to consider the interest of the losing party and the public, respect for their interests and justice calls for some measure of court control. Therefore, it would be unjust

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<sup>16</sup> *Ibid.*, p. 54; also in, Jan Paulsson, "Arbitration Unbounded ..." *op. cit.*, p.375. He argues that the control function of international arbitration has been shifted from the place of arbitration to the place of enforcement; also see Klaus Peter Berger, *op. cit.*, p. 712.

<sup>17</sup> Michael Kerr, "Arbitration and the Courts: The UNCITRAL Model Law," 34 *Int'l & Comp. L.Q.* 1 (1985). He states that: "there is virtually no body, tribunal, authority or individual in England whose acts or decisions give rise to binding legal consequences for others, but who are altogether immune from judicial review"; Jonathan Hill, *International Commercial Disputes*, 2ed, London: LLP, 1998, p. 640.

<sup>18</sup> It is not in the interests of the winning party to have an award reviewed by the court as this merely adds delay and expense.

to pursue the goals of speed and finality sought by winners at the expense of procedural justice.<sup>19</sup> However, the defenders of this opinion do not undermine the binding effect of arbitral awards on the parties, since they are obliged by their agreement to consider the resulting award as binding. But they argue that such an award is not binding for the state and the public since they were not party to that agreement. Therefore, an arbitral award must be subject to measures of control in order to protect the interests of members of the public who are not in dispute.

Also, one should consider that eliminating all examination of awards at the seat of arbitration may lead to unacceptable results. Firstly, if an award is not challenged in the country of origin, the loser will not be able to challenge errors or defects made by the arbitral tribunal<sup>20</sup>, for instance, where the minimum standards of procedural fairness are violated or a power is exercised ultra vires. If the loser cannot challenge these defects in the country of origin then the only hope for him is to challenge the defective award at a later time in any country in which enforcement may take place. Secondly, if the loser was the claimant in an international arbitration, then he may lose his right to recourse against the arbitral award for the simple reason that the other party (the defendant in an arbitration dispute) may not have any interest to enforce the award in other countries. This runs the risk of depriving arbitration of its reliability and would discourage parties from going to arbitration.

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<sup>19</sup> William W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," 63 *TUL. L. REV.*, (1989), p. 647, 684 -689.

<sup>20</sup> This may deprive the losing party from the possibility of having his case reviewed in proper new proceedings. See, Van den Berg, "The Efficacy of Award in International Commercial Arbitration," 58 *The Journal of the Chartered Institute of Arbitrators* (1992), 267 at 272.

In addition to that, one can argue that entrusting the court of the seat of the arbitration with equitable control over international arbitral awards has several advantages. A control mechanism serves to ensure that all aspects of the case have been fairly considered. This is also required to keep arbitration on the right track in order to prevent any possible corruption of the arbitral tribunal, such as the denial of a fair hearing or the violation of public policy.<sup>21</sup> After all, a state court cannot be expected to lend assistance to arbitration held within its territorial jurisdiction, whenever its assistance is required<sup>22</sup>, without imposing measures of control over the resulting award, for instance, ensuring that the award was not obtained by fraud.<sup>23</sup>

Finally, some scholars consider supervision of the arbitral award by the courts of the seat of arbitration as a requirement under the New York Convention, because the Convention is founded on a system of dual state control, firstly at the place of arbitration and secondly at the place of enforcement of the award.<sup>24</sup> Also, when a state allows an arbitral award to be made within its territory, it gives the award an international currency

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<sup>21</sup> See Georges R. Delaume, *op. cit.*, p. 18. He states that: "Acceptance of a reasonable amount of control may have both a preventive and a curative effect ... it may make the arbitrators alert to the fact that their behaviour and their decisions cannot altogether escape judicial scrutiny."

<sup>22</sup> Courts assist arbitration proceedings by compelling arbitration, by appointing arbitrators, by their revoking or replacing arbitrators, by compelling the attendance of witnesses; by taking evidence and by ordering conservatory measures by way of attachment of assets.

<sup>23</sup> V. V. Veeder, *op. cit.*, p. 59; Henry P. De Vries, *op. cit.*, p. 47; Jacques Werner, "Application of Competition Laws by Arbitrators," 12 *J.Int.Arb.*, (1995), p. 21 at 26. He states that: "... international commercial arbitration, whose existence is dependent on the assistance it receives from the legislative and judicial state authorities, can expect their support only to the extent it is perceived as not undermining or weakening the existing legal order."

<sup>24</sup> Eric A. Schwartz, "A Comment on *Chromalloy: Hilmarton a l'Americaine*," 14 *J.Int.Arb.* 2, 1997, p. 128.

or a nationality that facilitates the enforcement of the arbitral award against assets in jurisdictions that adhere to the New York Convention.<sup>25</sup>

One may reach the conclusion that the meaning of finality in the context of arbitral awards as it is used in the various provisions of national arbitration laws and rules of international institutions, implies that the courts of most countries of the world should be prepared to recognise and enforce the award as constituting a final decision on the dispute. The most important effect of finality is that neither party can unilaterally withdraw from the resulting award, as it is annexed to the binding effect of the arbitration agreement. This gives the award a *res judicata* effect, so that the losing party cannot bring a court action against the other in relation to the subject matter of the arbitration based on the same cause of action.<sup>26</sup> Therefore, the concept of finality should lead the court to dismiss the action on the grounds that the disputed issue had been conclusively disposed of and the resulting award was *res judicata*.<sup>27</sup>

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<sup>25</sup> Klaus Peter Berger, *op. cit.*, p. 656. He states that, "... almost all forms of review are derived from a sense of national responsibility to control the integrity of a process that receives state support. A nation that gives the arbitrator power to bring about legal consequences takes upon itself an obligation to ensure respect for the limits imposed on the arbitrator's authority and for fundamental procedural rights. The winner's interest in finality, privacy and economy must be weighed against the loser's concern for fair proceedings."

<sup>26</sup> For example, Article 55 of the Egyptian Law of 1994 provides that: "Arbitral awards rendered in accordance with the provisions of this the present Law shall have the authority of the *res judicata* and shall be enforceable in conformity with the provisions of this Law." Egyptian doctrines consider that the award becomes *res judicata* as of the day on which it is signed. The Egyptian court of Cassation, 14 March 1957 have held that awards became *res judicata* when they are made. See Abdul Hamid El Ahdab, "The New Egyptian Act...", *op. cit.*, p. 89.

<sup>27</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, 396; Robert D. A. Knutson, "The Interpretation of Arbitral Awards *When is a Final Award not Final?*," 11 *J.Int.Arb.* (1994), p. 99 at 100. He states that: "... in the context of international arbitration *res judicata* means that you cannot (or should not) have two bites at the cherry."

Accordingly, a control system exercised by the courts in the country of origin of the international arbitral award is necessary in order to guarantee the integrity of international arbitration, although to ensure respect for the finality of arbitral awards the courts' control must be limited to a finite number of grounds. Therefore, the real question should concern the extent of judicial control over the award.

## **B. Courts control over arbitral awards**

Legal systems may either have various grounds upon which a party can challenge the arbitral award or may limit these grounds to certain points. Generally, there are two ways in which the court may exert control: there can be a full review on the legal merits including procedural and substantive grounds, or a limited review of conformity to fundamental procedural fairness.<sup>28</sup> The latter may include, for example, the right to be heard, arbitrator fraud and excess of authority.

One should take into consideration a very important point here, that in practice the degree of control ultimately rests upon the approach of the national courts. This can be demonstrated by considering that the limits of control may differ between state A and state B, even if they have adopted the same arbitration rules, such as, the Model Law Rules. The degree of control may still differ between the two countries according to the

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<sup>28</sup> Klaus Peter Berger, *op. cit.*, p. 654. According to his view "... the striving for finality of international arbitral awards has shifted the emphasis of court control almost exclusively to the procedural side."

courts' approach in each country.<sup>29</sup> As a result, the extent of the judicial control will then depend on where the arbitration happens to be held. For example, courts in state A may have a more liberal approach towards the concept of parties' autonomy and respect to the finality of arbitral awards. Such an approach may aim to attract international arbitration to their country. In this regard, it has been reported that in England, "One of the reasons advanced for the Arbitration Act 1979 by its supporters was that interference by the courts over arbitrations held in England was so great that parties to disputes avoided holding arbitrations in England and thereby the country was losing a valuable invisible export (i.e., lawyers' fees) which had somehow been quantified at £500 million a year, according to the Commercial Court Committee".<sup>30</sup>

On the other hand, if we consider in the example above the approach of the courts in state B, which adopted the same arbitration rules, we see that it may have a more conservative approach towards international arbitration. This may be due to several factors, such as, the political or economic policy of the state and how familiar the courts of that state are with international commercial arbitration.<sup>31</sup>

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<sup>29</sup> Some countries may have a relaxed attitude towards arbitration on their territory, others may be more hostile to arbitration.

<sup>30</sup> Michael Kerr, *op. cit.*, p. 161; William W. Park, "Judicial Supervision of Transnational Commercial Arbitration," 21 *Harv.Int.L.J.*, (1980), p. 87. He states that, "... In 1979 England abolished the "case stated" procedure by which courts exercised control over the arbitrator's decision on the merits of the dispute. The background of the Act is enlightening with respect to the perceived economic advantages of subjecting international arbitration to less rather than more guidance at the place of the proceedings"; also see, Georges R. Delaume, *op. cit.*, p. 8. By referring to the liberal approach of French arbitration law, he suggests that, "... This positive attitude, clearly geared to ensuring the finality of international awards, should contribute to making France an attractive venue for international arbitration."

<sup>31</sup> See Ahmed S. El-Kosheri, "Public Policy Under Egyptian Law," *International Council for Commercial Arbitration (ICCA) New York Arbitration Congress*, (1986), p. 322. He states that in Egypt there are two doctrines. The first tendency favours a restrictive interpretation of the concept of public policy, the second favours avoiding international commercial arbitration as much as possible. He goes on to explain the negative effect of the latter approach as it leads to a



Clearly, adopting a well-developed arbitration law that consists of an exclusive list of limited grounds does not by itself guarantee limited control by the courts. In deciding on an attack against the validity of the award, courts that do not recognise the particular character of international commercial arbitration, particularly in countries which do not frequently host international arbitrations, may extend their control beyond the limited grounds which their national law includes. In contrast, a court that is aware of the international character of arbitration will keep the award within acceptable limits. It will be expected to maintain the delicate balance between recognising the finality of the arbitrators' decision and its duty as a guarantor of arbitral integrity.<sup>32</sup> However, keeping reviews within acceptable limits is not easy in practice, particularly as courts may find in the concept of public policy a loop-hole whereby they may extend their supervision of the arbitral award.<sup>33</sup>

## **II. The Extent of Public Policy as a Ground on which to attack the Award**

A party who is reluctant to honour the award may challenge the award in the country of origin in order to set it aside or at least to postpone its enforcement.<sup>34</sup> In order

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wide interpretation of the concept of public policy which includes all matters falling normally under the exclusive jurisdiction of the Egyptian courts.

<sup>32</sup> In *Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V.*, 2 Lloyd's Law Report [1984], 419, 423. Leggat J. states, "True it is that formerly the court was careful to maintain its supervisory jurisdiction over arbitrators and awards. But this aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency."

<sup>33</sup> William W. Park, "National Law and Commercial Justice...", *op. cit.*, p. 687. He states that: "Terms such as 'public policy' and 'ordre public' are malleable, and represent ill-defined concepts that risk lending themselves to court scrutiny on the merits of the award."

to achieve this goal he would seek to scrutinise the national law of that country searching for possible grounds upon which he can set the award aside. To this end, he may attempt to establish his challenge on any discrepancy between the mandatory rules of the law of the seat and the law the tribunal applied to the dispute.<sup>35</sup> The latter may concern the substance of the dispute or involve non-compliance with the mandatory procedural rules that are applicable in the country of origin. One here must address the question of how a national court would decide on such claims and according to which legal system? The answer to this depends on considering the distinction between the public policy rules which apply to domestic arbitral awards and international arbitral awards respectively.<sup>36</sup>

#### **A. The public policy rules applicable to domestic arbitral awards**

Traditionally, a court in the country of origin has legitimate authority over purely domestic arbitral awards, and parties are bound by all the mandatory rules applicable in

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<sup>34</sup> "Experience shows that parties dissatisfied with the award usually 'leave no stone unturned' to have the award set aside by the competent court at the seat of the arbitration, irrespective of their prospects in such proceedings." See, Klaus Peter Berger, *op. cit.*, p. 648.

<sup>35</sup> Several writers recognise this potential attitude; see, Steven C. Nelson, "Alternatives to Litigation of International Disputes," (1989) *Int.Law.*, 187, pp.192-193. He states that: "Sometimes the process of the courts may be abused by the recalcitrant party seeking to have the arbitration agreement found not enforceable on the ground that the arbitration offends public policy."

<sup>36</sup> The importance of this distinction has been highlighted by Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 261. He states that: "... one should carefully avoid the automatic assimilation or the confusion between those two kinds of 'public policy.' The confusion is particularly dangerous, and frequent, with regard to the procedural public policy of the state where the award has been rendered if such a state, or rather its legislation or case law, has not become fully conscious yet of the specificity of international arbitration by contrast to domestic arbitration and therefore applies to international arbitration, without adaptation nor exception, mandatory rules enacted and conceived for domestic arbitration."

that state.<sup>37</sup> This is mainly due to the function of the national courts, as their duty is to consider the consequences of enforcing the award in their own territory, and because they are the guardians of their national law they will ordinarily be expected to invoke the national public policy rules.<sup>38</sup> Accordingly, a domestic arbitral award may be set aside if it infringes a national rule that is considered mandatory in that state. The only exception would be the possible application of foreign public policy rules to purely domestic arbitral awards, if for example, the award infringes a vital public interest of a foreign country<sup>39</sup>, where this concerns the ‘duty of comity owed by one state to another’.<sup>40</sup>

## **B. The applicable public policy rules to international arbitral awards**

One should bear in mind here that parties may agree to hold arbitration in a particular country without having any connection whatsoever with that country, merely because it provides a neutral and convenient place, and provides a good location for the parties or the arbitrators to hold their meetings. The question here would be: do national courts recognise the specific character of such international arbitration when they are asked to set aside the resulting award for considerations of public policy?

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<sup>37</sup> See above, Chapter Two at p. 73.

<sup>38</sup> See, Klaus Peter Berger, *op. cit.*, p. 673. He considers national courts as “.. guardians of the public policy of its *lex fori*”; Okezie Chukwumerije, *op. cit.*, p. 182. He considers that the court will have no choice as to whether or not to apply the mandatory rule of its national law because, “... as a creature of the national legal system, its jurisdiction and powers are regulated by national law: it is constrained to apply the imperative laws of its forum.”

<sup>39</sup> For example, smuggling in breach of foreign revenue laws; trading with the enemy or preparing a revolution to be instigated abroad. See *De Wutz v. Hendricks* (1824) 2 Bing. 314; *Foster v. Driscoll* [1929] 1 K.B. 470.

<sup>40</sup> See Dennis Lloyd, *Public policy: a Comparative Study in English and French Law*, London: Athlone Press, (1953), p. 26; Dicey, *Conflict of Laws*, 6<sup>th</sup> ed., Stevens and Sons Ltd., p. 615; A. J. E. Jaffey, *op. cit.*, p. 56; *Regazonni v. KC Sethia Ltd.*, 1958 A.C. 301; [1957] 3 All E.R. 286.

There are two possibilities in this regard. First, a national court may consider its jurisdiction as being complete and thus the court may treat the award in exactly the same way as it would in a domestic arbitral award or at least courts may be tempted to turn toward national standards of public policy for guidelines. This may lead the court to apply national public policy rules to international arbitration. The second prospect generally relies upon applying a narrower doctrine of public policy.

The first possibility leads to an improper conclusion that includes treating an international arbitral award on the same footing as a purely domestic arbitral award, despite the difference between the two types.<sup>41</sup> Dealing with international arbitral awards under national law conditions ignores the fact that the dispute may not involve any national interest for the state of origin, since the economic or social impact of the award will take place outside the borders of that country. Therefore, one should consider here that several elements connect the award to other legal systems which would even be more concerned with the validity and impact of the resulting award. Thus, it would be more rational to consider that the validity of the award hinges upon the degree of its connection with one or more of the relevant foreign legal systems by using the relativity of public policy criterion. Pierre Lalive illustrates this criterion as:<sup>42</sup>

“... such conditions of application of public policy can be summed up by the formula of the ‘*relativity*’ of public policy, from three points of view: it must be appreciated in *concreto*, in relation to the circumstances of the concrete case and not (unless in extreme and particularly shocking cases) in relation to the abstract contents of a foreign rule; public policy is also relative in *space* (in the absence of a sufficient connection with the legal order of the forum, it will not come into play or will only have

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<sup>41</sup> See, Chapter One at p. 23.

<sup>42</sup> Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 262-263.

an indirect effect (*effet atténue*). Finally, public policy is relative in time (the exception will only intervene against a present attack against the fundamental rules of the forum.”

Deciding the applicable public policy rules according to the relevant connections between the dispute and the infringed public policy rule can be illustrated by using the following hypothetical example.

Presume firstly, that an action to set aside an international arbitral award for considerations of infringement of public policy was applied for in the country of origin where the latter was chosen for convenience reasons. Presume secondly, that the applicable law to the arbitration procedures and to the substance of the dispute was foreign to that country and finally that enforcement of the award was intended to take place in a foreign country.

To determine the validity of the award in the above example, courts should first consider the applicable law that governs the disputed issue, by considering whether or not that law has been chosen on the basis of being the most closely connected to the dispute. If there is strong evidence of that connection, such as, it is the law of the country in which the contract will be performed and it is the place where the award would most probably will be enforced, then determining the validity of the award should be based on what that law states. The award then must be set aside if it tends to damage the public interest which the annulling rule of that law is designed to protect.<sup>43</sup> Attention should also be paid

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<sup>43</sup> See A. J. Jaffy, *op. cit.*, p. 43.

to the ultimate purpose of the foreign mandatory rule, by examining whether or not it aims to protect a vital interest of that state.<sup>44</sup>

However, one should consider that it may not be easy to determine the validity of an award made under the public policy rules of a foreign legal system. This is because a court in the country of origin cannot determine to what extent public policy has been violated. For example, a court using a western legal system may not be able to understand the subtleties of application and the exact extent of a public policy rule deriving from the 'Shari'a' rules whereas a court in Saudi Arabia which is more familiarised with the precise nature and texture of such rules would. A similar problematic could occur the other way around. Also a court in the country of origin cannot decide what a foreign rule is particularly designed to prevent or how an international arbitral award would be treated under the legal system of that country. Moreover, according to the above hypothetical example, enforcement of the award will take place in a foreign country, therefore one should consider the possibility that the courts in such a foreign country may consider the award valid.

The situation would be different if in relation to the preceding example, the award was challenged for being contrary to the public policy of the country of origin although valid according to its proper law. One should consider that courts in the country of origin

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<sup>44</sup> Cheshire, *Private International law*, 7<sup>th</sup> ed, p. 143. He gives guide-lines as to what should be considered foreign law in such situations. A court in the country of origin when ascertaining whether "[the public policy rule of the foreign law] is all-pervading or merely local, must consider it in the light of its history, the purpose of its adoption, the object to be accomplished by it, and the local conditions"; also see, Dennis Lloyd, *op. cit.*, p. 92.



are not necessarily precluded from setting aside an award merely because it was governed by a foreign legal system, or because it was intended to be enforced abroad. In some cases, an award, whilst valid by the proper law or according to the law of the country where it is intended to be enforced, may nevertheless be considered null in the state of origin for considerations of national public policy.<sup>45</sup> However, the public policy of the state of origin should be invoked only in exceptional cases, particularly when the court of origin recognises that there is likely to be a possible connection between the award and the country of origin and when a vital national public interest might be at stake. Consideration of national public policy may also be based upon moral principles if the principles involved are so weighty as to lead the court of origin to set an international arbitral award aside. This is so irrespective of which country enforcement will take place in or of the attitude of the courts in that country.<sup>46</sup> Courts may also invoke national public policy rules in order to make sure that certain requirements of justice have been respected. This includes substantial and procedural irregularities, such as unequal treatment of the parties, fair notice of both the appointment of arbitrators and the conduct

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<sup>45</sup> See A. J. E. Jaffy, *op. cit.*, p. 43. He provides examples of this kind, stating that: "the public interest may be injuriously effected even by an act performed abroad, as with laws designed to protect national security, or exchange control or anti-trust legislation"; Dennis Lloyd, *op. cit.*, p. 85, states that: "It is recognised however that the 'ordre public' of the forum may be applied where the *lex fori* regards the provision of the foreign law as unacceptable"; Dennis Lloyd, *op. cit.*, p. 93; Okezie Chukwumerije, *op. cit.*, p. 181; also see, *Kaufman v. Gerson* [1904] 1 K.B. 941.

<sup>46</sup> Dennis Lloyd, *op. cit.*, p. 84 states that: "the court may still reserve to itself the right to refuse to lend its aid to a foreign transaction, though completely unconnected with the country of that court, where it is of a type which shocks the conscience or is utterly contrary to its notions of civilised standards." He also gave examples of "contracts which involve gross sexual immorality, or personal slavery and transactions which are regarded as fundamentally inadmissible". Also see, *Santos v. Illidge* (1860) 8 C.B. (N.S.) 861; *Foster v. Driscoll* [1929] 1 K.B. 470; *Lemenda Ltd. v. African Middle East Co.* (1988) Q.B.D., p. 461.

of proceedings and the existence of a fair opportunity to present the case.<sup>47</sup> However, applying these grounds to procedural requirements should be giving careful consideration to the distinction between procedural requirements in national arbitration and the requirements of equity and justice in international arbitration.<sup>48</sup> For example, an award should not be annulled if arbitrators have failed to comply with procedural requirements of the local law, which are merely designed for reasons of formality, such as, examining a witness or an expert or setting out the names of the parties and the arbitrators.<sup>49</sup>

If the infringement involves procedural irregularities, then examining the award should be based upon the law that governs the arbitration procedures.<sup>50</sup> Consideration must also be given to the parties' expectations.<sup>51</sup> This is because when parties choose a particular

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<sup>47</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 299. He considers these requirements as "general principles of international due process"; Articles 19(3) and 24(3) of "UNCITRAL" Model Law; Rubino - Sammartano. M., *op. cit.*, p. 303 to 313; Aktham A. El Kholy, *The Enforcement of International Arbitral Awards*. Al- Tahkim Al- Arabi, Vol. 2, January 2000, p. 20.

<sup>48</sup> The importance of this distinction has been recognised in many cases. See for example, *International Tank v Kuwait Fuelling* 1975, Court of Appeal. (Q.B.), p. 224; *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583; see also Dicey and Morris, *The Conflict of Laws*, 8th ed. Stevens and Sons Ltd., (1967), p. 1048; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p.445. The writers state that: "The differences between the domestic public policy requirements of states means that there is a risk that one state may set aside for reasons of public policy an award which other states would regard as unimpeachable."

<sup>49</sup> Aktham A. EL Kholy, *op. cit.*, p. 13. In this regard he states that: "Even if the position of the Egyptian Court of Cassation may have some justification for domestic awards, it appears to have no valid basis for international awards issued under different procedural rules such as those of the ICC."

<sup>50</sup> See *Dalmia Cement v. Nat Bank of Pakistan* 1975, Q.B. p 8; Stephen M. Schluuebel and Susan G. Lahne, *op. cit.*, p. 207; Michael John Mustill, *Transnational Arbitration and English Law*. Current Legal Problems, (1984), p.134.

<sup>51</sup> *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*, [1971]A.C.576; [1970] 3 W.L.R. 389. In this case it was provided that: "Subject to public policy the English court must give effect to the intention of the parties expressed in their contract and

law to govern the arbitration procedures their intention is to comply with the mandatory rules of that law, not to the procedural rules of the place where they held the arbitration proceedings, if these two were different.

The conclusion that can be drawn thus far is that examining the validity of international arbitral awards should be based on taking into consideration several elements. The first consideration should be the connection between the award and the legal system with which the award is most closely connected. Unless in exceptional circumstances as outlined above, there will be no rational reason for the court of origin to set the award aside for considerations of national public policy, particularly if the award is considered valid according to the applicable law and enforcement of the award is to take place in a foreign country.

A reasonable approach would be to apply the concept of international public policy, which includes examining the validity of the award according to its conformity with the mutual principles of justice and morality that are common to the majority of countries.<sup>52</sup> This alleviates the problem of a court of the country of origin attempting to apply the public policy of a foreign legal system with which it is not familiar, as in the given example concerning the application of 'Shari'a' rules. By applying international public policy rules the court of the country of origin thereby leaves the determination of the exact extent of public policy to the courts of enforcement, which may increase the

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demonstrated by the surrounding circumstances"; also see, *Bank Mellat v. Helliniki Techniki SA* [1984] Q.B. 291. 301.

<sup>52</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 445.

chances of enforcing the award in other jurisdictions. This may also preserve the integrity of the court's decisions when the award has been presented before the courts of another jurisdiction as a foreign arbitral award. As will be demonstrated in the following topic, an arbitral award that has been set aside in the country of origin may still be enforced in other countries if the court of enforcement considers that the nullification order of the court in the country of origin was based on unreasonable grounds.

### **III. The Consequences of Setting an Arbitral Award Aside in the Country of Origin**

Generally, a successful challenge may deprive the award of its binding effect, not only in the country of origin but also in other countries.<sup>53</sup> This is due to the effect of Article V (1)(e) of the New York Convention, which provides that recognition and enforcement of an award will be refused if, "...the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made."

In practice an award may be set aside by a court in the country of origin on the basis of national public policy rules where the same issue does not constitute a violation of public policy in the country in which enforcement takes place. This situation raises the following question: is it possible to enforce a foreign arbitral award where it has been set

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<sup>53</sup> Georges R. Delaume, *op. cit.*, p. 18. He describes this situation as, "... success at the seat of arbitration may turn to be a pyrrhic victory if it is followed by defeat in that country."

aside by the courts of origin for considerations of national public policy? In order to answer this question it will be necessary to review Article V (1)(e) of the New York Convention, and to scrutinise the recent international trends in this regard, particularly those which call for narrowing the application of Article V (1)(e).

#### **A. The concept of binding arbitral award under article V (1)(e)**

Albert Van den Berg explains the reasons for formulating Article V (1)(e) of the New York Convention in this way.<sup>54</sup> He states that this mainly aimed to avoid the requirement of “*double exequatur*”, a requirement which has been introduced in Article 4 (2) of the Geneva Convention of 1927. The Geneva Convention requires the arbitral award to be “final”.<sup>55</sup> Such a requirement has created difficulties for the practitioners of international commercial arbitration. According to Article 4 (2) of the Geneva Convention the winning party is obliged to prove to the court whose task is to enforce the arbitral award that no objection has been taken to the award or that its enforcement has not been suspended by a competent authority in the state of origin.<sup>56</sup> This can be done either by arguing that the time limit for challenge has been exceeded<sup>57</sup>, or that the court

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<sup>54</sup> Van den Berg, *op. cit.*, p. 332.

<sup>55</sup> Article 4 (2) of the Geneva Convention provides that: “The party relying upon an award or claiming its enforcement must supply, in particular: (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (*d*), in the country in which it was made.”

<sup>56</sup> The same requirement can be found under Article 37 of the Riyadh Arab Convention on Judicial Cooperation of 1983. Signed 6 April 1983; in force October 1985. *Intr. Arab Countries: Annex I* – 1. January (1990).

<sup>57</sup> Determining the time limit will depend on the applicable law as this varies from country to country. In this respect many countries limit this procedure to a very short space of time following publication, or in some cases the granting of the award. For example, the Model Law requires that an action for the annulment of an award must be brought within three months of

has rejected such a plea.<sup>58</sup> Otherwise the party seeking enforcement of the award will be obliged to obtain a leave for enforcement from the court of origin in order to confirm its finality, together with another request to the court of enforcement which leads to what is known as the “*double exequatur*”.<sup>59</sup>

To avoid such confusion, the word “final” in the Geneva Convention has been replaced with the word “binding” in the New York Convention which provides a clear indication that Article V (1)(e) does not require an enforcement order to be issued by the court of origin.<sup>60</sup> This was intended to provide a solution or a compromise between legal systems which require an enforcement order to be issued by a competent authority in the state of origin, and other legal systems which accept the enforcement of foreign awards without this requirement.<sup>61</sup> The problem that persists is how to determine at what point an

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notification of the final award to the party wishing to make the challenge; under Article 54(1) of the Egyptian law 1994 the action for annulment of the arbitral award must be brought within ninety days of the date of the notification of the arbitral award to the party against whom it was made; and according to the English 1996 Act, a party may lose the right to object (see Section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

<sup>58</sup> One should bear in mind that this may provide the losing party with an effective technique to be used for in order to delay matters since the award does not become “final” until the end of the challenging procedures.

<sup>59</sup> As a result of applying article 4(2) of the Geneva Convention many countries require that a foreign award should be confirmed by the court of its origin before it can be enforced in its territory. see W. Michael Reisman, *op. cit.*, p. 972.

<sup>60</sup> See Van den Berg, *op. cit.*, p. 332. He refers to the International Chamber of Commerce, Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention, ICC Brochure no. 174 (Paris 1935) p. 11, (reproduced in UN DOC E/C.2/373), in which it was reported that: “The International Chamber of Commerce left the word ‘final’ out in its Draft Convention of 1953. It reasoned that it has appeared advisable to consider the problem from a more practical angle and to envisage only the case of awards effectively set aside.”

<sup>61</sup> Article V (1)(e) of the New York Convention was drafted by Working Party No. 3. See UN Doc E/CONF. 26/SR.17; Van den Berg, *op. cit.*, p. 335.



arbitral award becomes binding according to the meaning of Article V (1)(e) of the New York Convention?

Van den Burg illustrates the meaning of the word binding thus:<sup>62</sup>

“The award can be considered to have become “binding” for the purposes of Article V (1)(e) at the moment on which it is no longer open to a genuine appeal on the merits to a second arbitral instance or court in those cases where such means of recourse are available.”

The general trend is to decide the question of when an arbitral award becomes binding by referring to the national law of the country of origin.<sup>63</sup> Article V (1)(e) of the New York Convention refers to the law of the country in which, or under the law of which, that award was made. Therefore, an award becomes binding within the meaning of Article V (1)(e) at the moment when it becomes ready for enforcement under the law governing the award.<sup>64</sup> This general and simple definition of the term ‘binding’ may not be sufficient since there are various legal systems the consequence of which would lead to various interpretations of this term. However, the modern trend is to move away from the requirement of obtaining leave for enforcement or proving that the award is final

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<sup>62</sup> *Ibid.*, p.357.

<sup>63</sup> In England the past situation according to Section 38(1)(b) of the 1950 Act, requires from the party who seeks to enforce a foreign award in England, proof that the award has become “final” in the country of origin. See *Union Nationale des Co-opratives Agricoles de Cereales v Robert Catterall and Co. Ltd* [1959] 2 QB 44; Andrew and Keren, *op. cit.*, p. 303.

<sup>64</sup> Van den Berg, *op. cit.*, p. 339. He states that, “... several courts appear to search under the applicable law for the moment at which the award can be considered to be inchoate for enforcement in the country of origin. Others attempt to find an equivalent of the term ‘binding’ under the arbitration law of the country of origin.” However, for some countries this would be after proving that the award becomes final in the sense of becoming definitively valid. For other states the meaning of ‘binding’ is when it is ready for enforcement and not when it has already been enforced; *Ibid.*, p. 340, referring to the Swiss *Conseil Federal*.

where the term binding may be narrowly defined to reduce court control at the enforcement stage.<sup>65</sup>

## **B. Enforcing nullified arbitral awards**

It has been argued that even where an award is set-aside by a court in the country of origin, it can still be upheld in the place of enforcement. There are two trends in this respect. The first trend refuses to enforce arbitral awards that have been set aside by a court in the country of origin. The second trend upholds enforcement of such awards if reasonable circumstances exist, for example, where justice and fairness are at issue.

The first trend is founded on the mandatory status of Article V (1)(e), as the annulment of the award in the country of origin generally leads to depriving the award of its legal effects which makes the award become non-existent in that country. Van den Berg advocates this trend by stating that:<sup>66</sup>

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<sup>65</sup> The concept of binding international arbitral awards is now recognised world-wide. See, ILA *Report*, London Conference (2000), *op. cit.*, p. 15. The report provides that: "... courts in a number of countries have referred to a policy in favour of giving effect as far as possible to the finality of international arbitral awards and discouraging the relitigation of issues already determined. This reflects the 'general pro-enforcement bias' of the New York Convention."; Gerold Herrman, *op. cit.*, p. 236; see the Egyptian court of Cassation decision in 1944 (decision no. 521/1944, Collection of Cassation's Decisions, year 29, p. 472). The Court held that an arbitral award is binding from the moment when it has been rendered, therefore the winning party can proceed to enforce it directly, since the binding affect of the award is different from the requirement of having an order to enforce it.

<sup>66</sup> Van den Berg, "Annulment of Awards in International Arbitration," in R. Lillich and C. Brower (eds.), *International Arbitration in the 21<sup>st</sup> Century: towards "Judicialization" and Uniformity?* Transnational Publishers Inc., Irvington, New York., (1992), 133, 161; Gray H Sampliner, "Enforcement of Nullified Arbitral Awards," *J.Int.Arb*, p. 145; also, Van den Berg, *op. cit.*, p. 355. He provides that enforcing an annulled award may lead to an uncertain results that can only be prevented by refusing to enforce such awards, "...a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which

“The fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of origin. How then is it possible that courts in another country can consider the same award as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special legal status to an award notwithstanding its annulment in the country of origin.”

Professor Pieter Sanders also supported this conclusion by emphasising that, once an award has been set aside by the courts of the country of origin “...the courts of the enforcing countries will...refuse the enforcement as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement”.<sup>67</sup> This has also been expressly emphasised by the United Nations Commission on International Trade Law on International Commercial Arbitration, which provides that:<sup>68</sup>

“The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of Article V (1)(e) of the New York Convention and Article 36 (1)(a)(v) of the Model Law.”

The second trend expresses the desire to reduce the ability of the court of origin to obstruct the enforcement of the award in other states.<sup>69</sup> This trend has emerged after the

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grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.”

<sup>67</sup> Pieter Sanders, “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 6 *Netherlands Int'l L.R.* 43, 55 (1955); William W. Park, “The Lex Loci Arbitri ...”, *op. cit.*, p. 23.

<sup>68</sup> Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, U.N.Doc. A/40/17 (United Nations ed., 1994), at 7 (b)(24).

<sup>69</sup> Jan Paulsson, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9 (1) *ICC Bulletin* 14; Gray H Sampliner, “Enforcement of Foreign Arbitral Awards after Annulment in their Country of Origin,” 11 *Mealey's int'l Arb Rep.* (September 1996); also Gray H Sampliner, “Enforcement of Nullified Arbitral Awards,” *J.Int.Arb.* p. 141, at 151. He states that: “... the success of our global system of enforcement of arbitral awards has reached the point

issuance of two famous decisions: one in the United States in the *Chromalloy Aeroservices v. The Arab Republic of Egypt* case<sup>70</sup> and the other in France in the *Hilmarton v. OTV* case.<sup>71</sup> Both the Hilmarton and Chromalloy cases demonstrated that some courts are willing to enforce awards annulled by the competent authorities of the countries in which or under the laws of which those awards were made.

The first observation that should be made here relates to the background of these two decisions as they were made by the French and United States' courts. Both countries have widely differing legal traditions, and this demonstrates a growing international trend in favour of the enforcement of an arbitral award that has been set aside by a court of origin.<sup>72</sup>

The conclusion to which these two cases have come, is mainly based on an interpretation of Article V (1). The phrase "may refuse" in this Article indicates that the grounds included are discretionary and not mandatory. In addition to this, the result is built upon consideration of Article VII of the Convention, which states that no provisions of the Convention "...deprive any interested party of any right he may have to avail

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where informed parties should expect that nullification of an award in the rendering country will not necessarily prevent enforcement elsewhere."; H. G. Gharavi, "The Legal Inconsistencies of *Chromalloy*", 12 *Int'l Arb. Rep.* 21 (May 1997); Eric A. Schwartz, *op. cit.*, p. 131. He provides that: "... enforcing an annulled award assumes from the outset that, despite its annulment, there still remain[s] in existence an award capable of enforcement."

<sup>70</sup> *Chromalloy AeroServices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996); 11 Mealey's *Int'l Arb. Rep.* (August 1996) at C-54.

<sup>71</sup> *OTV v. Hilmarton*, Cour de Cassation, June 10, in JDI, 1997, no. 4.

<sup>72</sup> This could be considered as establishing a judicial precedent in the practice of international commercial arbitration.

himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

In the *Chromalloy* case the US District Court granted enforcement of Chromalloy’s award, in spite of its nullification by the Egyptian Court of Appeal. This case concerned a military procurement contract signed in 1988 between an American corporation “Chromalloy AeroServices Inc.” and “Air Force of the Arab Republic of Egypt”. In 1991, Egypt terminated the contract and Chromalloy directly started arbitration proceedings in Egypt under Egyptian law. On 24 August 1994, the Arbitral Tribunal issued its final award, based on the facts presented and upon the Egyptian Civil Law. The decision held that Egypt had not properly terminated the contract, and therefore was ordered to pay the amount of US\$ 16.2 million plus interest. Thereafter, Chromalloy sought enforcement in the United States, by requesting the US District Court to enforce the award. As a response the losing party, the government of Egypt, filed a court action before the Egyptian Court of Appeal seeking to nullify the award, on the grounds that the award failed to apply the “administrative law” of Egypt.

In December 5, 1995, the Cairo Court of Appeal issued a final decision in favour of the Egyptian government, ruling that the arbitrator had erred in law and nullified the final award. The Egyptian government then raised an action in the United States with a view to dismissing the petition, arguing that the District Court is obliged to repudiate the award under Article V (1)(e) of the New York Convention. In addition to that, the District Court is obliged to recognise and give effect to the ruling of the Egyptian court, a duty imposed under the notion of judicial comity in respect of foreign judgements.

Despite the Egyptian court's decision on July 31 1996, the US District Court granted Chromalloy's petition to recognise and enforce the arbitral award. The court recognised that there was consensus between the parties to the contract that made their arbitral award final and binding and not "subject to any appeal or other recourse". The Court also found that there existed a strong US public policy in favour of the judicial enforcement of this clause. Accordingly it held, pursuant to the long-established public policy exception to judicial comity in respect of foreign judgements, that a decision to recognise the Egyptian court decision would violate this clear US public policy.<sup>73</sup> Moreover, the court recognised that Article V (1)(e) of the New York Convention provided a discretionary standard for refusing to enforce an award, by reference to the phrase "recognition and enforcement may be refused"<sup>74</sup>, and that Article VII of the Convention required courts to grant parties all the rights they could have under the domestic law of the country where enforcement was sought.<sup>75</sup>

The court, however, found that enforcement of the Egyptian judgement would violate public policy in the United States regarding arbitration, and refused to recognise

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<sup>73</sup> Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," *op. cit.*, p. 144.

<sup>74</sup> The language of Article V (2)(b) is permissive, that is, the court may deny enforcement but is not obliged to do so. See, Christopher B. Kuner, *op. cit.*, p. 73; Van den Berg, *op. cit.*, p. 265; however, some scholars refuse to interpret Article V (1) as giving the court discretion to enforce the award. Gerold Herrman, *op. cit.*, p. 235. He suspects that the drafters never intended to give room for discretion.

<sup>75</sup> The US district court concluded that Section 10 of the Federal Arbitration Act provided Chromalloy with a claim to enforcement of the award because the basis on which the Egyptian court annulled the award (an error in law) was not in their view a valid ground for setting aside an award under Section 10. Chromalloy, 939 F. Supp. At 910-911.



it, rejecting thus the argument raised by the Egyptian party that the judgement of the Egyptian court had to be recognised under the principles of international comity.

Six months later, the Court of Appeal in Paris upheld a lower court order made in France making an arbitral award in favour of Chromalloy, that it was to be enforceable in France, under Article VII and French law, despite the annulment of the award by Egypt's Court of Appeal.<sup>76</sup>

The other important decision in this regard is the decision of the French Court of Cassation in *Hilmarton v. OTV*.<sup>77</sup> The award relates to a dispute regarding the payment of a substantial payment of fees from OTV to Hilmarton. On August 19<sup>th</sup> 1988, the arbitral tribunal rendered a decision against the claimant "Hilmarton", on the grounds that the contract violated Algerian public law, and specifically Algerian rules forbidding the use of intermediaries. On April 17<sup>th</sup> 1990 the Swiss Federal Tribunal<sup>78</sup> annulled the arbitral award, on the grounds that the arbitrator could only base his decision on the law chosen by the parties or on the genuine rules of international public policy but could not rely solely on the rules of any given legal system. In spite of this, OTV sought recognition and enforcement of the arbitral award in France where the Paris Court of Appeal held on December 19<sup>th</sup> 1991, that the award was enforceable in France. This decision became

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<sup>76</sup> *La Republique Arabe d'Egypte v. Chromalloy AeroServices Inc.*, Paris App., First Chamber, Section C, published in 12 Mealey's Int'l Arb. Rep. (April 1997) at B-1. Cited in Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," *op. cit.*, p. 142.

<sup>77</sup> *OTV v. Hilmarton*, Cour de Cassation, June 10, in JDI, 1997, no. 4.

<sup>78</sup> Judgement of 17 April 1990 (*Hilmarton v. OTV*), Tribunal Federal Suisse, 1993 Rev. Arb. 315, 322, translated in XIX ICCA Yearbook 220 (1994).

final on March 23<sup>rd</sup> 1994, when the Court of Cassation rejected the appeal.<sup>79</sup> While the French enforcement proceedings were pending, Hilmarton, obtained a judgement from a different French court recognising the Swiss courts' annulment of the award and started a new and a second arbitral process which gave its decision in Geneva on April 10<sup>th</sup> 1992. This second arbitral award ordered the defendant, OTV, to pay Hilmarton the commission provided for in the contract. The Swiss courts confirmed the second arbitral award. Following this, the Court of Appeal of Versailles granted enforcement of this award and confirmed the recognition of the Swiss judgement that had nullified the first award. In June 1997 the French Court of Cassation, reversing the lower court's decision held that the recognition in France of the first arbitral award by a final decision relating to the same controversy between the same parties, was *res judicata*, thereby creating an obstacle to any recognition of court decisions or arbitral awards that were subsequently found to be incompatible.<sup>80</sup>

Based upon these two cases<sup>81</sup>, there is now a growing tendency towards recognising and enforcing arbitral awards that have been set aside by a court in the country of

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<sup>79</sup> Judgement of 23 March 1994 (Hilmarton v. OTV), Cass. Civ. L'ere, 1994 *Rev. Arb.*, at 327-28, translated in XX ICCA Yearbook 663, 664-65 (1990).

<sup>80</sup> Judgement of 10 June 1997 (Hilmarton v. OTV), excerpt translated in XXII ICCA Yearbook (France No. 27), 1997.

<sup>81</sup> One should mention here that there are several other cases which concern the same issue, for example, *Sonatrach v. Ford, Bacon and Davis, Inc.*, Trib. Pr. Inst. De Bruxelles, 6 December 1988, excerpted translation in XV ICCA Yearbook 370 (1990). Cited in Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," *op. cit.*, p. 156, footnote 60; *Baker Marine v. Chevron and Chevron Corp*, 288. United State Court of Appeals, Second Circuit, 12 August 1999, Nos. 97-9615, 97-9617, *Yearbook Comm. Arb'n* XXIV (1999).

origin.<sup>82</sup> This approach has increased the possibility of actually enforcing international arbitral awards.

The question that has not been settled yet is under which circumstances can a court recognise and enforce a foreign award that has been set aside by the court of origin?

As has been dealt with above, in the *Chromalloy* and *Hilmarton* cases, Article V (1)(e) was considered as providing a discretionary ground since the formulation of Article V (1) of the Convention "Recognition and enforcement of the award may be refused" indicates that the court is not compelled to refuse the enforcement. A court, thus, is empowered with discretion which can allow enforcement to "be refused" if the court considered it right and proper. In addition to that, Article VII of the Convention confers the parties to all the favourable rights that they could obtain under the domestic law of the country where enforcement is sought.

However, this approach should not lead to disregarding the importance of the rule that Article V (1)(e) is designed to protect. The importance of controlling the award by the courts in the country of origin cannot be overstated. In order to strike a balance between the requirement of respecting the decision of the court of origin and that of enforcing annulled awards, one may say that, enforcing a nullified arbitral award should

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<sup>82</sup> See, Emmanuel Gaillard, *op. cit.*, p. 3. He states that: "...these two decisions, and the growing international consensus which they exemplify, can only be lauded"; Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," *op. cit.*, p. 142, stating that, "I supported the U.S. decision, noting that it was, a major victory for supporters of binding international arbitration"; Jan Paulsson, "Enforcing Arbitral Awards ...", *op. cit.*, p. 27.

only be confined to exceptional cases. For example, when the court of enforcement finds that the nullification order by the court of origin has been obtained by fraud<sup>83</sup> or that the nullification was based on unreasonable grounds<sup>84</sup> as when considerations of national public policy in the state of origin conflict with neither international public policy nor the public policy rules of the country of enforcement. Consideration should be given in these circumstances to the connection between the arbitral award and the country of origin. Thus, if the award has no connection to that country other than that it was chosen for convenience as a neutral forum then the decision to set the award aside because it violates purely national public policy rules may not be recognised in other countries. One might add here that enforcing an annulled arbitral award should not be considered as a mark of disrespect directed at the court of origin. If it were, then the same criticism could be made when the court of enforcement refuses to enforce an award that has been deemed enforceable by the court of origin<sup>85</sup>; for example, where an award is made that is contrary to the public policy of the state in which it is to be enforced.

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<sup>83</sup> This may occur, for example, in cases where the annulment of the arbitral award was based on corruption, bias, or the impartiality of the court which set the award aside. For example, if the courts in the country of origin were biased, because one of the parties was the state of origin itself, and accordingly did not afford the winning party any procedural right to present a case in favour of enforcing the award. See Andrew and Keren, *op. cit.*, p. 295; William W. Park, "The Lex Loci Arbitri...", *op. cit.*, p. 23. He states that: "post-annulment recognition of awards would be appropriate either where permitted by an international treaty, such as under the European Convention, or when the local judiciary in the country of origin is "corrupt or biased"; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 431.

<sup>84</sup> Gary H. Sampliner, "Enforcement of Nullified Arbitral Awards," *op. cit.*, p. 162.

<sup>85</sup> The New York Convention and the Model Law principle impact is, "...that recognition (*exequatur*) in the country where an arbitral award is rendered is not necessary for it to be recognised and enforced elsewhere." See Jan Paulsson, "Arbitration Unbound..." *op. cit.*, p. 366.

Finally, it is open to question why enforcement of an arbitral award that was annulled in the country of origin is not possible, especially if there are grounds on which the enforcement could be justified. For example, if the court of origin had set the award aside due to merely formal requirements of the national procedural law such as where an arbitrator refused to sign the arbitral award, this not being required according to the applicable procedural law. Why does this necessarily lead to a refusal to enforce the award in a foreign country? Could the country of enforcement recognise the award simply by maintaining that under its law the result of the arbitration is perfectly valid and the reason for annulment in the country of origin is peculiar and deemed to be limited to that country?

## **CHAPTER FIVE**

### **FOREIGN ARBITRAL AWARDS CONTRARY TO PUBLIC POLICY (PROCEDURAL ISSUES)**



## **Chapter Five**

### **Foreign Arbitral Awards Contrary to Public Policy (Procedural Issues)**

The enforcement of a foreign arbitral award in a country other than that in which it was made is one of the stages in the arbitration process in which the court may exercise some control in respect of public policy considerations. At this stage, the court or the competent authority in the country in which the enforcement is sought may examine the award in order to ensure that it complies with particular national regulatory requirements. It is precisely because such conditions vary from country to country that the New York Convention is so important, as it serves to harmonise the enforcement requirements of foreign arbitral awards between the member states.

Since this study is concerned with examining the effect of public policy on the enforcement of foreign arbitral awards, the focal point will be Article V (2)(b) of the New York Convention. As mentioned earlier in this study, Article V (2)(b) of the Convention has created a great amount of complexity.<sup>1</sup> This is due to the fact that there are no clearly defined limits to what can be considered contrary to the public policy of countries that are party to the New York Convention. The interpretation of this ground has been left to the national courts emanating from different legal systems and diversity of political, economic, religious and social considerations. Therefore, the concept of public policy has, perhaps inevitably, been applied in different ways, where various categories of public policy issues have emerged since 1958 when the Convention came into being.

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<sup>1</sup> See Chapter One, at p. 55.

It is the intention here to work towards a clearer and more coherent application of public policy by attempting to search for certain standard of public policy rules applicable to foreign arbitral awards. To this end, the ongoing distinction under question in this thesis, between applying domestic or international public policy as a ground for refusing the enforcement of a foreign arbitral award will be further explored. This is to be achieved through analysing the cases which have considered the same public policy questions, and comparing their approach in order to determine whether, and if so to what extent, the public policy provision has been an effective defence against the enforcement of foreign awards. The evidence supports the argument that the notion of an 'international public policy' is increasingly recognised in the courts as a basis for interpreting Article V (2)(b) of the New York Convention.

To address this argument sufficiently, public policy issues can be categorised into two main areas, procedural public policy rules and issues that relate to the subject matter of the dispute.<sup>2</sup> One should consider that the arbitration procedures may be subject to a measure of control by the court of enforcement in order to ensure that they comply with the requirements of procedural fairness and public policy rules in the state of enforcement.<sup>3</sup> Also, one should recognise that public policy covers a wide range of issues which relate to the subject matter of the dispute including moral, social, political, economic or any other aspect considered a fundamental issue affecting the interests of the state in which the enforcement of the award is taking place. This may be termed 'substantive public policy'. Substantive public policy is distinct from procedural public policy, in that substantive public policy relates to the

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<sup>2</sup> Van den Berg, *op. cit.*, p. 300 and 376; Rubino-Sammartano. M., *op. cit.*, p. 301; see the comments in the 1985 UNCITRAL Commission's Report, UN Doc. A/40/17 paras. 297 and 303; the ILA *Report*, London Conference (2000), *op. cit.*, p.15, states that: "Public policy includes both substantive and procedural categories"; Klaus Peter Berger, *op. cit.*, p. 676.

<sup>3</sup> Rubino-Sammartano. M., *op. cit.*, p. 297; Stephen M. Shwebel and Susan G. Lahne, *op cit.*, p. 207.

recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award as opposed to procedural public policy, which relates to the process by which the dispute was adjudicated.<sup>4</sup>

The scope and the extent of application of public policy according to these two categories must be carefully analysed. Therefore, this chapter will be confined to reviewing a number of situations and judicial decisions that have been considered as constituting a violation of procedural public policy issues, leaving examination of the substantive public policy issues to the following chapter.

## **I. Procedural Public Policy Issues**

Enforcement of a foreign arbitral award may be refused if the arbitral procedures (on which the award was based) infringe the standards of procedural due process<sup>5</sup>, as conceived by the courts in the country where enforcement is taking place. This is due to the fundamental values of justice and fairness, such as respecting the right of defence and equity as upheld by the concept of public policy in the state of enforcement. In this regard, the courts of enforcement may invoke the public policy ground as a safety net to remedy the procedural irregularities that emerged during the arbitration proceedings. For example, courts in the country of enforcement may find that the applicable foreign law to the arbitral procedures, although is proper to govern the arbitration procedures, but it obstructs justice. Accordingly,

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<sup>4</sup> See, *ILA Report*, London Conference (2000), *op. cit.*, p. 17.

<sup>5</sup> The defence of denial of due process is a procedural irregularity which incorporates the infringement of procedural public policy rules. See, Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 208; Klaus Peter Berger, *op. cit.*, p. 677; Hussam Fatahi Nasif, *Supervising Foreign Awards by the National Courts*, Dar Al Nhdah al Arabiah (1996), p. 41. (in Arabic).

procedural public policy as a ground concerns the procedural fairness which relates mainly to the question of whether or not the requirements of natural justice have been observed in the arbitration proceedings.<sup>6</sup> This requires the examination, for any issue that would hinder justice between the parties, of a wide range of procedural requirements upon which enforcement of a foreign arbitral award may be refused.

To illustrate the extent to which public policy is applied to procedural issues, several examples considered as requirements of procedural public policy need to be examined. The first issue under examination will be the parties' right to be treated equally. The second issue concerns whether the absence of a strong basis for the award having been made can be a valid ground for refusing to enforce the award. Finally, lack of impartiality will be examined as a public policy issue since lack of impartiality is a lack of justice.

#### **A. Equity and Fair Opportunity to Present the Case**

Generally, equity in arbitration demands that each party should have an equal right to present his case before the arbitral tribunal. According to this principle, each party should be made aware of the issues the other party is attempting to prove and which issues the opposing party will have to meet<sup>7</sup>, so that neither party will be taken by surprise by either the evidence

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<sup>6</sup> Public policy also intervenes to repair the possible unevenness that may originate from the concept of "parties' autonomy", to restore equilibrium between the parties where one party would otherwise be more dominant in an arbitration agreement, as the dominant party in an arbitration agreement may impose additional or difficult conditions on the other party. It may be, for example, the dominant party coerces the other party to accept the appointment of a sole particular arbitrator, under its influence, to decide on the dispute, or that only the dominant party can be heard by the arbitral tribunal. Such conditions are invalid, even if both parties had agreed to it. This was the view of the Egyptian Court of Cassation in case No. 97/ 1977 year 28, p. 511; Klaus Peter Berger, *op. cit.*, p. 677, see particularly his comments on this issue according to the Dutch and Swiss laws.

<sup>7</sup> See, *Irvani v. Irvani*, [2000] 1 Lloyd's Rep. 412; [2000] C.L.C. 477. The facts of this case include that the sole arbitrator, who was appointed to resolve the dispute, had relied upon information which had not been made available to one of the parties. The court held that: "the arbitrator's conduct had

or the arguments advanced by the other party.<sup>8</sup> This includes the right of the claimant to present his case and the right of the respondent to discuss the position of the other party.<sup>9</sup> Therefore, in order to achieve this, each party should be fully informed of any issue of fact or law which is raised by the other party, whether or not he may have anticipated it.<sup>10</sup>

The parties' right to have an equal opportunity to present their case raises several issues. Parties, for example, have the right to be notified of the appointment of the arbitral tribunal, the arbitral proceedings, and the allegations which have been raised against them. Parties also have the right to be afforded an opportunity adequately to present their case<sup>11</sup> and

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arguably given rise to a breach of the rules of natural justice, which could establish that (A) had been 'unable to present his case' for the purposes of S.103 (2)(c)"; also see, *Montrose Canned Foods Ltd v. Eric Wells (Marchants) Ltd* [1965] 1 Lloyd's Rep 597; *Government of Ceylon v. Chandris* [1963] 2 Q.B., 327; Van den Berg, *op. cit.*, p 307. He states that: "The principle of due process implies that the arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon."

<sup>8</sup> In *Government of Ceylon v. Chandris* (1963) 2 QB 327, [1963] 2 All ER 1, [1963]2 WLR 1047, Mr Justice Megaw stated that: "It is, I apprehend, a basic principle, in arbitrations as much as in litigation in the courts (other of course, than *ex parte* proceedings) that no one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may override that basic principle"; also see, *Woolridge Timber Ltd v. Brannntorps Travaru* (1982) The Times 14 June. Mr Justice Parker held that: "... if an award was, or might have been based on points which were not put to the other side, the interests of justice required that the award be set aside or remitted"; *Scrimaglio v Thornett and Fehr* (1923) 17 Ll L Rep 34; See, John Parris, *Arbitration Principles and Practice*, Granada Publishing (1983), p. 122.

<sup>9</sup> Berthold Goldman, "Commentary", in 60 Years On, A Look at the Future, *op. cit.*, p. 267. He distinguished between the right of a party to present his case and the right of the other to discuss the position of his opponents: "these two requirements are not identical, since the first implies that every party must have the opportunity to develop fully its claims and arguments in defence, whilst the second ordains that no question shall be decided by the arbitrator until each party has been afforded the opportunity of discussing it"; also see, *Moran v. Llovd's* (1983) The Times 3 March.

<sup>10</sup> D. Mark Cato, *op. cit.*, p. 55. He states that: "An arbitrator must give each party a fair and proper opportunity to meet the other's case. In order for this to occur, each party must be able to find out what the other side's case is, and this will involve the arbitrator in ensuring that all pleadings, reports and other relevant documents, e.g. any written submissions, are copied to all interested parties."; This duty was also emphasized by Megaw J. in *Montrose Canned Foods Limited v. Eric Wells (Merchants) Limited* [1965] 1 Lloyd's Rep. 597.

<sup>11</sup> Van den Berg, *op. cit.*, p. 307; Roger K. Ward, "The Flexibility of Evidentiary Rules in International Trade Dispute Arbitration- Problems Posed to American- Trained Lawyers," 13 *J.Int. Arb.*, September (1996), No. 3., p. 11. He emphasised that: "parties to an arbitration should have an



to be represented in arbitration if they wish by an attorney or other representative.<sup>12</sup> General hearings should be convenient, efficient, and fair for all parties.

Such procedural conditions aim to guarantee equality between the parties, since equity is the most vital element in any kind of dispute resolution, including litigation before a court of law. Therefore, the parties' right of having a fair opportunity to present their case is generally protected by mandatory rules that can be found in most national arbitration laws<sup>13</sup>, which impose upon arbitrators the obligation to observe high standards of conduct and to maintain fairness in arbitration.<sup>14</sup> Under the New York Convention, the parties' right to present their case has been expressly mentioned in Article V (1)(b)<sup>15</sup>, which provides that

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absolute right to have, at a very least, an opportunity to contradict the evidence introduced against them."

<sup>12</sup> See, for example, Section 36 of the English Act 1996: "Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him"; this right was considered in Arbitral Case No. 112/1997, Issued under the auspices of The Cairo Regional Center for International Commercial Arbitration (CRCICA), 1 *Journal of Arab Arbitration* (1999), p. 45. The tribunal examined the requirements of parties representatives under Article 4 of the UNCITRAL Rules, and provided that: "Article 4 does not stipulate that the parties' representatives should be lawyers, neither do they provide for any particular conditions -whether formal or informal - for the methods of representation. The previous wording of this article provided that the parties should be represented by lawyers or agents, but in the current wording this condition was revoked and the parties are allowed to be represented by any persons of their choice without procedural conditions"; also see, *Henry Bath & Son Ltd v. Birgby Products* (1962) 1 Lloyd's Rep 389; *Tatem Steam Navigation v. Anglo-Canadian Shipping Co Ltd* (1935) L1. L. R 161; Canon IV of the Code of Ethics 1977 for Arbitrators in Commercial Disputes, prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association AAA and a special committee of the American Bar Association ABA; (1985) X Yearbook Commercial Arbitration, p. 239.

<sup>13</sup> The right of the parties to have an equal and fair opportunity in presenting their case has been asserted by several legal systems, for example: Section 33 of the English law of the 1996 Act; Article 18 of The UNCITRAL Model Law which states that: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"; Article 26 of the Egypt law of 1994: "The two parties to arbitration shall be treated with equality, and each shall be given an equal and full opportunity of presenting its case"; also see, Canon III(A) and (C) of Code of Ethics of 1977.

<sup>14</sup> Parties must be given the opportunity to address the arbitrator on any finding of facts; see *Fox v. P.G. Wellfair Ltd* [1981] 2 Lloyd's Rep 514; *Gbangbola v Smith & Sherriff Ltd* *Gbangbola v. Smith & Sherriff Ltd*, (QBD) [1998] 3 All E.R. 730; see Canon I of the Code of Ethics of 1977.

<sup>15</sup> The right of a party to be given a notice of the arbitration proceedings in sufficient time to enable him to present his case and to be properly represented is also a condition for enforcement of foreign arbitral awards under Article 2 (b) of the Geneva Convention of 1927.



recognition and enforcement of the award may be refused if “(b)...the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”<sup>16</sup> One could recognise here that the first part of Article V (1)(b) expressly refers to two important procedures: the proper notice of both the appointment of the arbitrator<sup>17</sup> and of the arbitration proceedings. In the second part of Article V (1)(b), the phrase “or was otherwise unable to present his case” implies that a court may refuse the enforcement whenever it finds other procedural irregularities that would affect justice between the parties. Public policy here takes precedence whenever a violation to the due process.

It could be argued that, as long as the right of both parties to present their case is explicitly maintained in various national laws and international conventions, then there should be no grounds for the issue of public policy to be raised under Article V (2)(b) of the New York Convention. The answer to such an argument lies in the fundamental value of protecting such rights.<sup>18</sup> One should keep in mind here that even if such provisions are not explicit in the law, ensuring that the principle of equality between the parties to present their case should be strictly observed as a fundamental right.<sup>19</sup> To justify the interference of the

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<sup>16</sup> Article V (1)(b) succeeded Article 2 (1)(b) of the Geneva Convention of 1927, which provides that: “(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented.” However, Article V (1)(b) of the New York Convention has a wider application as it includes all cases that involving a serious violation of due process.

<sup>17</sup> Notice of the appointment of the arbitrator has been held to imply notification of the name of the arbitrator. Without knowledge of the name of the arbitrator, the right of a party to challenge the appointment of the arbitrator would be lost. See Van den Berg, *op. cit.*, p. 305.

<sup>18</sup> Van den Berg states that Article V (1)(b) has been inserted in the Convention because of the specific importance attached to the fundamental requirement of a fair hearing. He also emphasised the importance of this ground which could be protected under Article V (2)(b) of the Convention. Van den Berg, *op. cit.*, p. 300.

<sup>19</sup> In regard to the link between due process and public policy, Professor Berthold Goldman emphasised that: “... the details of mandatory public policy requirements concerning the arbitral

courts on the public policy ground, one should consider the difference between Article V (1) and Article V (2) of the New York Convention. The grounds which are provided under paragraph (1), should be raised by one of the parties<sup>20</sup>, whereas under paragraph (2) they can be raised by the court of enforcement on its own motion. Therefore, if a court finds a procedural irregularity that violates the national procedural public policy, then it may refuse enforcement on its own motion.

Furthermore, one should recognise that Article V (1)(b) does not identify under which law a court can determine whether a party has been given proper notice and whether or not he was able to present his case. The absence of a clear reference to the applicable law might provide the court of enforcement with a legitimate reason to apply its national mandatory rules under Article V (2)(b) of the Convention. Van den Berg provides that several legal systems have applied their national law in examining the validity of foreign arbitral awards under Article V (1)(b).<sup>21</sup> To some writers, the absence of a clear reference as set above, has been considered as constituting a truly international rule detached from any national law.<sup>22</sup> However, to determine the applicable law concerning the question of whether or not a party was afforded a reasonable opportunity to take part in the arbitral proceedings, regard should be made first to the law or rules under which the parties have elected the arbitration to take place, as this

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hearing and related procedures . . . are so obvious. They lay down that each party's right to present its case and to discuss the position of the other party must be respected." Berthold Gldman, 60 Years on, *op. cit.*, p 267; also see, Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 216; Rubino-Sammartano. M., *op, cit.*, p. 307; Redfern and Hunter, 2<sup>nd</sup> ed., *op, cit.*, p. 293.

<sup>20</sup> It has been reported that the defence of a violation of due process enjoys a high popularity amongst the defence allowed by the Convention. See, Van den Berg, *op, cit.*, p.297. He also states that parties may prefer to raise this defence under Article V (2)(b) as a respondents may think that the invocation of public policy of the forum is more impressive. *Ibid.*, p. 300.

<sup>21</sup> Van den Berg, *Ibid.*, p. 298. He states that: "although that no court has held that Article V (1)(b) constitutes an international rule, many have affirmed that standards of due process are basically to be judged under their own law". See in particular footnote 186, where several court decisions are provided therein.

<sup>22</sup> G. Gaja, New York Convention (Dobbs Ferry 19978-1980) "Introduction" I.C. 4; Van den Berg, *op, cit.*, p. 298.

reflects the parties intentions.<sup>23</sup> In the absence of a specific choice, the applicable law should be based upon the standards of due process of the originating state. This reflects the importance of the law of the country of origin in assisting the tribunal during the arbitration proceedings.<sup>24</sup>

As an additional control a court in the country where enforcement is sought may refuse to enforce the award under its national mandatory rules in virtue of Article V (2)(b). For example, this could possibly occur if one of the parties was not properly notified of the arbitration proceedings and where such procedural deficit was so serious that it may lead the court of enforcement to apply the mandatory procedural rules of its national law in order to ensure that justice has actually been invoked in arbitration.<sup>25</sup> However, this might lead to an inappropriate result, since several procedural laws and rules could have close link to the arbitration and the resulting award. Therefore, to examine the validity of a foreign award a court should consider such potential conflict between its national mandatory procedural rules and the rules that was applied to the arbitration procedures.

The question here is what if the court finds that the procedure which was followed during the arbitration, although correct according to the applicable law to the arbitration procedures, is not fair and does not guarantee an equal opportunity for the parties to present their case according to the national procedural mandatory rules in the country of enforcement? For example, if parties were notified of the appointment of the arbitral tribunal

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<sup>23</sup> Mustill and Boyd, 2<sup>nd</sup> ed., *op, cit.*, p. 283.

<sup>24</sup> See, Andrew and Keren, *op cit.*, p. 306; Georges R. Delaume, *op, cit.*, p. 16; also see, *Parsons and Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 at p. 975 (U.S. no. 7). The court highlighted the importance of the law of the country of origin, it held that: "the New York Convention essentially sanctions the application of the forum State's standards of due process."

<sup>25</sup> Rubino-Sammartano. M., *op, cit.*, p. 306.

by regular mail, where the law in the country of enforcement requires specific procedures under the penalty of nullification of such notification. The rational procedure that could be followed by a court in such situation is to scrutinise the purpose of its national procedural rule before it decides to refuse the enforcement for considerations of due process. Many scholars assert that in such situation a court must examine whether a serious violation of due process has occurred and whether or not the arbitral award would not have been different in case the irregularity in the procedure had not occurred.<sup>26</sup> Moreover, a court is required to give more attention to its ultimate duty which should be confined to considerations of justice between the parties and not to enforcing formal requirements imposed by its national procedural law.<sup>27</sup> Therefore, a defence that is based on the ground of violation of due process should not be accepted except in very serious cases only. For example, the court must examine whether or not notice was actually received, rather than to whether the technical service requirements of its domestic law were met.<sup>28</sup>

In England, for example, in *Minmetals Germany GmbH v. Ferco Steel Ltd*<sup>29</sup>, the court held that:

“A court deliberating whether to set aside leave to enforce a foreign award had to examine the alleged injustice of the arbitral procedure.”

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<sup>26</sup> Van den Berg, *op. cit.*, p. 301.

<sup>27</sup> See for example, *Egmatra v Marco Trading Corp* [1998] CLC 1552. In this case the arbitral tribunal refused to permit a party's expert witness to give evidence. When the award was challenged on this ground, the court took a non-interventionist approach and held that this had not caused that party a substantial injustice.

<sup>28</sup> Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 217. The writes state that: “sufficient notice is an element of international public policy,... in the international context courts will look to the substance of whether notice was actually received, rather than to whether the technical service requirements of its domestic law were met”; Van den Berg, *op. cit.*, p. 303. He states that: “the word ‘proper’ can also be interpreted in the sense that the notice of the appointment of the arbitrator and the arbitral proceedings must be *adequate*... the notice need not be in a specific (official) form.”

<sup>29</sup> *Minmetals Germany GmbH v. Ferco Steel Ltd*, January 20, [1999] 1 All E.R. (Comm) 315; [1999] C.L.C. 647; (1999) XXIV *Yearbook* 739.

The court reached the conclusion that an arbitral award must be examined according to the actual purpose of the procedure and whether or not notice has actually been received or merely that there has been a breach of technical service requirements. In this case two arbitration awards were made under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC). Ferco applied to set aside the leave granted to *Minmetals* under Section 101 of the English Arbitration Act 1996, for being denied an opportunity to present its case. The court was asked to decide whether the procedure for arriving at the awards had been in accordance with the parties' agreement, thus complying with the CIETAC rules, and whether Ferco had shown that the means of arriving at the awards was contrary to English public policy to enforce them. The court dismissed the application, and held that:

"It followed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Art. V, which applied to the awards, that an enforcer had to be given a reasonable opportunity to present its case in relation to the findings of fact resulting from the investigations undertaken by the arbitrators."

Another significant decision worth mentioning in this regard was made by the Mexican courts<sup>30</sup>, in which the petitioner had served its notice of arbitration by mail in accordance with the procedures according to the ICC Rules. This method however violated the Mexican law, which requires initial personal service. The Court held that the parties, by agreeing to arbitration, had waived the service formalities of Mexican law, which was not part of Mexican public policy, providing that the award: "did not violate Mexican public policy, especially since actual notice to the other party had been clearly proved."

It is to be recognised from these two decisions that courts favoured the application of international public policy rules over the requirements of national public policy. This

approach is based on a modern approach which considers the latest developments in international commerce and the modern means of communication, which offers many advantages over traditional means of communication.<sup>31</sup> It also based its test upon answering the question of whether or not the breach of the national rule has a significant effect upon justice between the parties for example whether or not parties have had an equal opportunity to present their case.

## **B. Considerations of due process and the parties' right to present their case**

There are several issues that have to be considered in examining the requirements of due process. The broad wording of Article V (1)(b) of the New York Convention provides an indication to potential procedural irregularities. This could be inferred from the second part of Article V (1)(b) which provides that: "or was otherwise unable to present his case", the phrasing of this article indicates that enforcement of the award could be refused for other serious irregularities that would affect the right of each party to present his case. Since preventing a party from presenting his case, sufficiently, is an infringement of justice, which may drive a court to examine such procedural irregularity under its national rules for consideration of public policy.

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<sup>30</sup> The Eighteenth Civil Court of First Instance for the Federal District of Mexico, Yearbook Vol. IV (1979), at 301 (MexicoNo.1); see also, Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 218.

<sup>31</sup> The future indicates that international commerce and arbitration as a means to resolve commercial disputes will use new systems of communication, such as telefax and electronic mail. Parties of an international commercial arbitration and arbitral tribunals may prefer to hold arbitration in a country that recognises modern means of communication as legally valid. See, List of Matters for Possible Consideration in Organising Arbitral Procedures, United Nations Commission on International Trade Law (UNCITRAL), at its twenty-ninth session (New York, 28 May - 14 June 1996).



There are several examples that can be addressed in this regard. For example, when a statement given by a witness on which it was claimed the arbitrators based their award, conflicted with testimony he had given on previous occasions<sup>32</sup>, or if the award was based on a false testimony and thus could be considered as having been obtained by fraud.<sup>33</sup> The latter case could be raised as a sufficient ground to refuse enforcement of a foreign award for considerations of public policy, in addition to the civil and criminal liability.<sup>34</sup> Also, enforcement of a foreign arbitral award could be refused if the arbitrator receive an evidence from one party in the absence of the other or without giving the other party the chance to give a full evidence in rebuttal, or a key witness gave his evidence to the arbitrator in the absence of the other party, which could be considered as a procedural defect that violates the procedural mandatory rules of the country where enforcement is sought. Another example that could raise questions under the requirements of due process, is when an arbitrator refuses to hear offered evidence. The refusal of an arbitral tribunal to give one of the parties the chance to present what that party believes to be a relevant evidence to prove his case, without providing any legitimate excuse for its refusal, contradicts with the party's right to have a fair opportunity to present his case, which could be considered as a violation of public policy.<sup>35</sup>

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<sup>32</sup> See Christopher B. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention," 71 *Journal of International Arbitration* (1990), p. 84.

<sup>33</sup> This issue was considered by the English courts in *Westacre Investment Inc. v. Jugoimport-SDPR Holding Co. Ltd.*, [1999] 2 Lloyd's Rep. 65. It was alleged that the award had been obtained by perjured evidence and should be unenforceable on grounds of fraud. The court held that "a party will not normally be permitted to adduce in the English courts additional evidence to make good an allegation of fraud, unless it is established that: (a) the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) the evidence of perjury must be so strong that it would reasonably be expected to be decisive at a hearing"; also see, *Owens Bank Ltd v. Bracco*, [1994] Q.B. 509; [1994] 2 W.L.R. 759; [1994] 1 All E.R. 336.

<sup>34</sup> For example, in England, see the Perjury Act 1911, Section 1. (2) expressly states that the term "Judicial proceedings" includes proceedings before any tribunal or person having by law power to examine evidence on oath; also see, Marianne Roth, *op. cit.*, pp. 21 and 22.

<sup>35</sup> See Roger K. Ward, *op. cit.*, p. 5 at 8.

Before seeking to examine how could a court decide on these issues, one should consider that arbitrators, unlike the courts of law, are not obliged to comply with all the national mandatory rules that regulate the presentation of evidence.<sup>36</sup> This is mainly due to the practical consideration in international commercial arbitration, as arbitrators are often expected to decide the dispute in a short time where such requirement could be found in most of the modern arbitration laws and institutional rules.

For example, Section 33 of the English 1996 Act requires from the arbitral tribunal to adopt procedures which best resolve the matter fairly without causing unnecessary expense and delay.<sup>37</sup> Therefore, one may presume here that arbitrators are given a wide discretion to determine the evidence that could be presented before the tribunal, and thus arbitrators can decide the evaluation of the presented evidence in terms of their relevance and importance. One should consider here that this may contradict with the parties rights to decide the procedure for their reference under Section 34 (1) of the 1996 Act.<sup>38</sup> However, this potential conflict could arguably be determined if we consider Section 40(1) of the 1996 Act which requires that parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings including, “complying without delay with any determination of the

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<sup>36</sup> Arbitrators, therefore, are not guilty of misconduct if they accept evidence not in accordance with the strict rules of the court or do not require a document to be proved with the strictness required by the law. In *GKN Centrax Gears Ltd. v. Matbro Ltd* [1976] 2 Lloyd’s Rep 555, Lord Denning said that: “One of the reasons for going to arbitration is to get rid of the technical rules of evidence and so forth”; *Carlisle Place Investments Ltd v. Wimpey Construction (UK) Ltd.* (1981), 15 B.L.R. 109, Mr Justice Goff stated that: “... no requirement that an arbitrator must allow each party to call all the evidence which he wishes to call”; John Parris, *Arbitration Principles and Practice*, *op. cit.*, p. 121.

<sup>37</sup> Section 33 (1) “The tribunal shall: (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”; also see, Article 20 (1) of the ICC Rules which provides that: “Arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

<sup>38</sup> Section 34 (1): “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.”

tribunal as to procedural or evidential matters, or with any order or directions of the tribunal.”<sup>39</sup>

One should also consider that the methods and requirements of presenting evidence are different in international commercial arbitration from the same requirements in litigation before national courts. For example, in practice it may happen that an arbitrator may refuse to hear a fresh evidence which was presented to him by one of the parties after conclusion of hearing but before the award. Also, it may happen that an arbitrator might stop the counsel of one of the parties from emphasising a point because the arbitrator thought that he is being long-winded.<sup>40</sup> The question here is, can such decisions, which were made during the arbitration process, affect the enforcement of the award on the ground that the tribunal refused to hear certain evidence which amounted to fundamental unfairness, and therefore could be used as a sufficient ground to refuse the enforcement of the foreign arbitral award under Article V (2)(b) of the New York Convention?

The rational view that could be considered here is that determining on such issues should be established upon a careful examination of whether or not arbitrators have considered fairness in making the award and whether or not parties have had a fair opportunity to present their case.<sup>41</sup>

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<sup>39</sup> See Andrew and Keren, *op cit.*, p. 122.

<sup>40</sup> D Mark Cato, *op, cit.*, p.261.

<sup>41</sup> See, *O'Sullivan v. Joseph Woodward & Sons Ltd* [1987] I.R. 255; *Estcheap Dried Fruit Company v. N.V. Geroeders Catz' Handelsvereeninging* [1962] 1 Lloyd's Rep. 283; D Mark Cato, *op, cit.*, p.258 and 259.

This point of view was considered by the District Court in the United States in *Tempo Shain Corp. v. Bertek Inc.*<sup>42</sup> This case relates to challenging of an arbitral award because, during the arbitration proceedings, Bertek intended to call a witness to provide what Bertek believed to be crucial testimony concerning issues that related to the negotiations and dealings between the parties. However, although the witness was willing to testify, he became temporarily unable to attend the hearings because of his wife's illness. Bertek urged the panel to keep the case open until the witness could testify either in person or by deposition. Despite Bertek's request, the panel closed the hearing without waiting for the witness's testimony, and rendered an award in favour of Tempo. However, the district court confirmed the award based on its conclusion that "the arbitration panel was required to decide whether Pollock's testimony would add to the panel's knowledge or merely be a cumulative "rehash" of what the panel had already heard from other witnesses". The court decided that:

"... except where fundamental fairness is violated, arbitral determinations will not be opened up to evidentiary review, and arbitrators must give each of the parties to the dispute an adequate opportunity to present its evidence and argument."<sup>43</sup>

The above examples demonstrate instances where a foreign arbitral award can be subject to courts' control for considerations of procedural public policy. The problem that concerns this study is that a court in the country of enforcement may examine the enforcement of equality between the parties and the fair opportunity to present their case under the requirements of its national public policy. Such control exercised by the courts may cause confusion to parties and arbitrators, as under the threat of refusing the enforcement of

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<sup>42</sup> *Tempo Shain Corp. v. Bertek Inc.*, 120 F3d 16 (2d Cir. 1997). Cited in, Julie A Klein, "Agreeing or refusing to Hear Evidence," 2 *The New York Law Journal* February (1998).

<sup>43</sup> See also, *Generica Ltd. v. Pharmaceutical Basics Inc.* 125 F3d 1123 (7th Cir. 1997). The court held that "the arbitrator's refusal to permit continued cross examination from a witness that the arbitrator deemed immaterial to the proceedings at issue, did not deny the party Due Process"; *Iran Aircraft Industries v. Avco Corp.* 980 F2d 141 (2d Cir. 1992), cited in, Julie A Klein, *op cit.*, p. 4.

the arbitral award they would have to give absolute priority to national legal procedural considerations rather than to the factors of fairness, convenience, and neutrality, besides that it is difficult for arbitrators to consider the application of the procedural requirements of all countries that have connection to the dispute. For the sake of avoiding such confusion in international commercial arbitration, most of arbitration laws and arbitration rules of international institutions have abandoned the formal procedural requirements which are normally required in litigation before the courts. For example, in presenting of evidence, as arbitrators have the power to evaluate the evidence in terms of its relevance and importance. This evidently can be seen, for example, under Section 33 and 34 of the English Arbitration Act of 1996, Article 20 of the ICC Rules and Article 20.3 of the LCIA Rules.<sup>44</sup>

Examining the validity of foreign arbitral awards according to the national procedural public policy rules of the country of enforcement is problematic since such procedural rules are multiple and varied.<sup>45</sup> This may raise a conflict of public policy rules since what may be considered as contrary to the public policy rules of the country of enforcement may be considered valid according to the procedural law which has been applied to the arbitration proceedings. For example, arbitrators in some legal systems can decide whether or not to examine witnesses and parties under oath or affirmation.<sup>46</sup> This may create problems in the

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<sup>44</sup> Article 20.3 of the LCIA Rules provides that: "Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or as a sworn affidavit."

<sup>45</sup> See David W Shenton, "Supplementary rules governing the presentation and reception of evidence in international commercial arbitration," *Contemporary Problems in International Arbitration*, Julian Lew ed., (1986), p.187 at 190.

<sup>46</sup> Marianne Roth, *op. cit.*, p. 11. The writer distinguishes between affirmation and oath as: "Affirmation is the alternative form of solemnly declaring to tell the truth before giving evidence or making an affidavit. As distinguished from an oath, an affirmation does not refer to God and is used by persons who object to being sworn on oath"; Peter R. Griffin, "Resent Trends in the Conduct of International Arbitration, Discovery Procedures and Witness Hearings," 17 *J.Int.Arb.* (2000), p. 19 at 28. He states that: "Some legal systems allow arbitrators to administer oaths, while others do not. A common practice in international arbitration is to have the witness state that they will be truthful and



enforcement of foreign arbitral awards if enforcement takes place before courts where their national procedural law requires providing testimony on oath and considers this issue a fundamental requirement.<sup>47</sup> Therefore, such courts may refuse enforcement of the award on the ground that the arbitral award was improperly produced.<sup>48</sup> Also, it is said that such differences in the methods and regulations of presenting evidence can be found between the civil and common law systems.<sup>49</sup> For example, the civil law system does not have “discovery” procedure as understood by the common law system.<sup>50</sup> Also, in the civil law system, the preparation of witnesses for their examination on the trial is considered unethical.<sup>51</sup> This is intended to keep witnesses out of the proceedings except for their own testimony as it serves the truth finding process in proceedings where there is no pre-trial

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that they are aware that false declarations may lead to criminal penalties. While this is not the same as taking oath, it does serve to highlight the solemnity of the proceedings, and remind the witness of the duty to tell the truth”; see for example, the Oaths Act 1978 (English law), the prescribed words for the affirmation are: “I, A.B., do solemnly, sincerely and truly declare that the evidence I shall give shall be the truth, the whole truth and nothing but the truth”; John Parris, *Arbitration Principles and Practice*, *op. cit.*, p. 127; See *Kirkawa Corporation v. Gatoil Overseas Inc.* [1990] 1 Lloyd’s Rep. 158.

<sup>47</sup> Article 33 (4) of the Egyptian Arbitration Law of 1994 clearly provides that: “The hearing of witnesses and experts shall be taken without oath”. This has been considered by some of the Egyptian doctrines that the Egyptian legislator has abandoned a fundamental rule by decisively declaring this rule in Article 33 (4), in order to make it clear for the Egyptian courts that hearing of witnesses and experts under oath is no longer a matter of public policy in Commercial arbitration. Nariman Abd al Khader, *op. cit.*, p. 142.

<sup>48</sup> This also applies to cases when the administration of oaths by arbitrators in a country where the law only allows oaths to be administrated by judicial officers. See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 294, at footnote 29.

<sup>49</sup> Arbitration procedures and the law of evidence differ in the common law and civil law systems. See, Roger K. Ward, *op. cit.*, p. 6; the ILA Report, London Conference (2000), *op. cit.*, p. 10; David W Shenton, *op. cit.*, p. 188; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 326.

<sup>50</sup> Discovery is a procedure according to which, each party is obliged to disclose to the other party in advance the documentation comprising the written part of the evidence. See, John A Tackaberry, “The conduct of arbitration proceedings under English law,” Julian Lew ed., (1986), p.216 at 221; Peter R. Griffin, *op. cit.*, p. 19 at 20; for more information about the principle of discovery, See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 330; D. Mark Cato, *op. cit.*, p. 171.

<sup>51</sup> Marianne Roth, *op. cit.*, p. 11; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p.443, at footnote 8. The writers provide an example of this kind: “In common law systems, it is usual for lawyers to take statements from witnesses before the hearing ... a practice which is frowned upon (and indeed regarded as improper) in many civil law countries.”



discovery, whereas, according to the common law system, parties and their counsel are permitted to prepare a witness for a witness hearing. In this regard Peter Griffin emphasises that.<sup>52</sup>

“As a general rule, there is nothing untoward in assisting a witness in general preparation for a hearing. Indeed, many witnesses require some form of preparation as they may never have testified before. Parties must, of course, bear in mind that nothing in the preparation of a witness should compromise his or her ability to testify truthfully.”

International commercial arbitral awards are in most cases based on foreign laws that should be respected.<sup>53</sup> Therefore, an award that is correctly produced under a foreign law must not be refused unless the resulting award leads to a serious violation of justice between the parties.<sup>54</sup> Accordingly, not every procedural irregularity constitutes a sufficient reason to refuse enforcement of foreign arbitral awards.<sup>55</sup> A distinction should be made between national and international public policy, where in the latter, courts should be more flexible and should give regard to considerations of justice rather than insisting on the literal application of their national law, for example in presenting evidence and providing the parties with proper notice of the arbitration proceedings.<sup>56</sup> Applying the concept of international

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<sup>52</sup> Peter R. Griffin, *op. cit.*, p. 19 at 28.

<sup>53</sup> In the conflict of laws theory it has been said that it is necessary to apply foreign laws in cases involving a foreign element because not to do so would constitute a disregard of the sovereignty of another state within its territory and thus show a lack of comity towards it. See, J. G. Collier, *op. cit.*, p. 379.

<sup>54</sup> Courts would not intervene unless the breach of rules of evidence is fundamental to the arbitrator's decision or amounts to a breach of the rules of natural justice. *The Government of Ceylon v. Chandris* [1963] 1 Lloyd's Rep 214; *Agroexport v. NV Goorden Iport SA* [1956] Lloyd's Rep 319; Kenneth S Rokison, *op. cit.*, p. 96.

<sup>55</sup> The ILA Report, London Conference (2000), *op. cit.*, p.14, where the report provides that: “the award must be so fundamentally offensive to that jurisdiction's notion of justice”; In *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, 269, Kerr J. stated that: “Article 20 of the ICC rules merely provides that the arbitrator shall have the power to hear witnesses. It gives him a discretion but imposes no obligation. Indeed, the procedure followed by the arbitrator in this case is in my experience the usual procedure in ICC and other continental arbitrations. There can, therefore, be no question of any infringement of any rule of English public policy.”

<sup>56</sup> Aktham A. El-Khoul, *op. cit.*, p. 19. He states that: “The equality between the parties is also a principle of international public policy, but the equality is not supposed to be mathematical.”

public policy in determining whether or not equity has been upheld in arbitration, could resolve problems arising from differences between several legal systems.<sup>57</sup> Referring to the concept of international public policy in such cases leads to narrowing the domain of formal conditions that are imposed by national public policy which ultimately leads to searching for the justice and equity between the parties where the latter by itself is the object of procedural public policy rules.

## II. Lack of Reasons in the Award

The absence of adequate reasons behind an arbitral award has on occasion led to a refusal to enforce the award in countries which consider the provision of the reasons for which an award was made as a fundamental requirement.<sup>58</sup> Article V (2)(b) of the New York Convention may be invoked in support of such a refusal. The question here is whether a court can refuse to enforce a foreign arbitral award which does not contain reasons, because the

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<sup>57</sup> One should consider in this regard the role of the IBA Rules (International Bar Association Rules) concerning the presentation and reception of evidence in international commercial arbitration which mainly aims to bring the gap between the common law and civil law systems, and to resolve problems that often arise in international arbitration. The International Bar Association Rules, adopted in 1983, see (1985) 1 *Arbitration International*). These rules have been revised and now new IBA Rules on the Taking of Evidence in International Commercial Arbitration were adopted by the IBA Council in June (1999). Published in *Arbitration*, Vol. 65, No. 4 (1999), p. 297, and in Redfern and Hunter, 3rd ed., (1999), Appendix K; also see, Michael Buhler and Carroll Dorgan, "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration: *Novel or Tested Standard?*," 17 *J.Int.Arb.*, (2000), p. 3 at 5. He states that: "The advantage of the IBA Rules is that they placed witness testimony within a rigid framework and appeared to reflect a somewhat uneasy compromise between the common law and civil law systems."

<sup>58</sup> The question of whether providing arbitral awards with reasons is a procedural or a substantive matter was determined by the French Court of Cassation in *Compagnie d'Armement Maritime v. Ompagnie Tunisienne de Navigation*, Court of Cassation (France), March 18 (1980), *Rev. Arb.* 1980, at 496. In deciding whether the reasons of an award are compulsory or not, it held that this must be decided under the applicable procedural law and not under the substantive law. Cited in, Rubino-Sammartano. M., *op. cit.*, p. 311.

national law of that court considers providing reasons in an award as a fundamental requirement? The answer to this requires recognition of the following points:

The requirement to provide an award with reasons differs from country to country. In several legal systems, the requirement of providing an arbitral award with reasons is fundamental.<sup>59</sup> Other legal systems do not consider reasoning an award as vital in order to enforce an award.<sup>60</sup> This difference between legal systems could obstruct the process of enforcement of arbitral awards. Therefore, it was deemed important to reach a solution that could make enforcement of foreign arbitral awards more obtainable.

Secondly, it must be noted that most of the international conventions concerning the enforcement of foreign arbitral awards do not provide a clear stand on whether or not providing an award with reasons is a requirement for the enforcement of foreign arbitral

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<sup>59</sup> Rubino-Sammartano. M., *op. cit.*, p. 310. He referred to examples from several national laws: "The requirement that the award be reasoned is so strongly rooted in several legal systems that in some of them, the Italian one for example, it is even a requirement specified in the Constitution. The Constitution of the Republic of Italy states that: 'All decisions of courts of law must be reasoned.' This requirement seems also strongly rooted in Spanish, Dutch, German, French, Japanese, Article 41 of the Saudi Arbitration regulations (Saudi Arabia, *Yearbook Commercial Arbitration* 1984, Vol. IX, at 29)"; M. Chafik, Egypt, *Yearbook Commercial Arbitration* 1979, vol. IV, at 53; Abid el Wahab Al Bahi, "Thoughts Concerning Providing Awards with Reasons According to some International, Regional and Legislative Framework," 2 *Journal of Arab Arbitration* (2000), p. 132 at 139. (in Arabic). The writer provides that this is a fundamental requirement according to Article 204 of the Qatar Law, Article 183 of the Kuwaiti law and Article 760 of the Libyan Law, Article 48 of the Yemeni Law of 1992, Article 270 of the Iraqi Procedural law and Article 318 (2) of the Moroccan Law; also see, Rene David. *op. cit.*, p. 323, concerning the Swiss courts attitude in this regard.

<sup>60</sup> Van den Berg, *op. cit.*, p. 381. He states that: "in several Common law countries it is customary not to give reasons in the award"; Rubino-Sammartano. M., *op. cit.*, p. 311 who provides that: "Other legal systems do not give so much importance to this and thus relieve arbitrators of the task of giving reasons. This seems to be the case in Austrian, Indian, Australian and English legal systems"; Mustill and Boyd, *op. cit.*, p. 543; Rene David, *op. cit.*, p. 319; Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 224. The writers state that: "In the United States, an arbitrator is not required to give reasons in his award"; Howard Holtzmann, National Report United States, *Yearbook* Vol. IX (1984) IX at 62; *Trave Schiffahrts GmhH v. Ninemia corp* [1986] 802. Q.B; see also the United States courts decision in *re Aimcee Wholesale Corp. & Tomar Prods.*, 21 N.Y 2d 621, 626-27, 237 N.E, 2d 223, 225 N.Y.S. 2d 968, 971 (1981). The court stated that: "arbitrators are not obliged to give reasons for their rulings or awards. Thus our courts may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law." Cited in Henry P. De Vries, *op. cit.*, p. 73.

awards.<sup>61</sup> Neither the Geneva Protocol of 1923 nor the Geneva Convention of 1927 dealt with this issue. The New York Convention does not provide a specific rule in this regard. It seems that the Convention left this issue to be determined by the national law of the country where enforcement is taking place. An alternative approach may be based upon Article V (1)(d) from which one could infer (as this is not explicit) that the requirement to provide reasons in arbitral awards will depend on the law that was applied to the arbitration procedures. Article V (1)(d) states that: “the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, in accordance with the law of the country where the arbitration takes place”. Therefore, in examining whether to refuse enforcement of a foreign arbitral award because of a lack of reasons, a court should base its decision upon the agreement of the parties and in the absence of such, on the law of the country where the arbitration takes place.

Finally, it is important to understand the purpose of providing an award with reasons as this may illustrate the connection between doing this and the notion of public policy. Providing reasons in an award is important to justify the grounds upon which it is based, in order to provide the parties with an explanation of how and why the arbitral tribunal reached its

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<sup>61</sup> In this regard, one can mention that some international conventions may provide explicit conditions to provide an award with reasons. For example, Article 32 of the Amman Arab Convention (Amman Arab Convention on Commercial Arbitration, signed 14 April 1987), which requires that arbitral tribunals must state the reasons upon which the award is based. However, Article 34 of the Amman Convention does not include non reasoning of an award as one of the grounds to set an award aside. The consequence of this may drive the courts in the countries (which are members of the Amman Convention) to refuse enforcement of arbitral awards (which are subject to this convention) under the public policy ground for violating a mandatory rule in the convention itself. In addition to that, Article 35 of the Amman Convention provides that: “The Supreme Court of each contracting state must give leave to enforce the awards of the arbitral tribunal. Leave may only be refused if this award is contrary to public policy”. See, Hamza Haddad, “The Arbitration Decision according to Amman Convention for International Commercial Arbitration of 1987,” 1 *Journal of Arab Arbitration* (1999), p. 24; Article 24 (5) of the Agreement on the Settlement of Disputes Between Arab Investment Receiving States of 1974 provides as a ground to set an award aside that: “The award has failed to state the reasons on which it was based.” Abdul Hamid El Ahdab, “General Introduction on Arbitration ...,” *op. cit.*, p. 13.

conclusion<sup>62</sup>, and to enable the court to consider questions which may arise from the award. Therefore, it is considered fundamental that the parties are informed how justice has been done to their case. This includes that the award must be specific, unambiguous and capable of performance by the party against whom it is directed. It may also be important for the enforcing body, when it is imposed by its national legal system, to provide reasons in the award to enable the award to stand on its own sufficient information.<sup>63</sup>

A distinction, thus, has to be made between the parties' request to provide an award with reasons, as part of the parties' right to know how the arbitral tribunal reached its decision, and the requirement of the law to provide reasons, in order to review the merits of the award by the courts so as to supervise how justice has been considered in the case.

It is now common in many modern legal systems to find provisions of law which give the parties a free choice to decide whether or not to provide the award with reasons according to the concept of parties' autonomy in international commercial arbitration.<sup>64</sup> For example, in deciding the form of the award, Section 52 of the English law of 1996 provides that:

"(1). The parties are free to agree on the form of an award. (2). If or to the extent that there is no such agreement, the following provisions apply. (3). The award shall be in writing signed by all the arbitrators or all those assenting to the award. (4). The award

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<sup>62</sup> See Van den Berg, *op. cit.*, p. 381.

<sup>63</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 390; *Universal petroleum v. Handels Uncl* [1987] 1 Lloyd's Rep. 517; Henry P. De Vries, *op. cit.*, p. 74, stating that: "arbitrators must refer to rules with the authoritative weight of law to aid in reaching a decision and to justify that decision to the parties ... particularly if an award is to be recognised and enforced internationally, it should state reasons with a legal basis, including reference to the process by which that legal basis was selected."

<sup>64</sup> Regard here should be made to the arbitral awards which takes the form of settlement awards, where arbitrators are merely expected to record the terms agreed upon by the parties and do not render a decision on the merits. Therefore, settlement awards do not require reasons since arbitrators do not reach their conclusions through any reasoning; Rene David. *op. cit.*, p. 324; See Section 52 English 1996 Act; see Chapter One, at p. 16.



shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.”<sup>65</sup>

Article 43(2) of the Egyptian law of 1994 provides that:<sup>66</sup>

“The arbitral award shall state the reasons upon which it is based, unless the two parties to arbitration have agreed otherwise or the law applicable to the arbitral proceedings does not require the award to be supported by reasons.”

Article 31(2) of the Model Law provides that:

“(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.”

However, giving parties the autonomy to decide whether the provision of reasons should be a requirement is limited to countries that recognise such freedom in their national arbitration rules. On the international level, one can establish the requirement of providing reasons according to the prevailing trend that distinguishes between national and international arbitral awards. For example, the Court of Appeal of Northern Lebanon, made a clear distinction between internal arbitral awards that are subject to internal public policy, (which

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<sup>65</sup> See also Section 70 (4) which provides in this regard that: “If on an application or appeal it appears to the court that the award- (a) does not contain the tribunal's reasons, or (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.”

<sup>66</sup> It has been reported that prior to the law of 1994, the prevailing doctrine used to consider as public policy the explicit requirement stipulated in Article 507 of the Egyptian Code of Procedures concerning the necessity of expressing the reasons of the award. Accordingly, the absence of reasons prevents an award from being enforceable in Egypt, regardless of whether or not the law of the country where the award has been made requires the issuance of a reasoned award. However, now Art. 43(2) of the Egyptian law of 1994 entitles the parties to agree to permit the arbitral tribunal to provide an award without reasons; Aktham A. El-Khoul, *op. cit.*, p. 20. He considers that: “The lack of reasons of an award issued under a law which does not require reasons may be a violation of internal public policy but not of international public policy.”



considers it compulsory to back-up an award with reasons), and international arbitral awards that are subject to international public policy, (which does not require such reasons).<sup>67</sup>

The Italian courts, in *S.A. Tradax Export v. S.p.a. Carapelli*<sup>68</sup>, considered the enforcement of an arbitration award that was rendered without reasons under the rules of the Grain and Feed Trade Association (London). The court noted that English law permits awards without reasons and that the New York Convention does not require reasons, stating that; “what is fundamental in Italian law of procedure cannot be imposed upon foreign legislatures or judicial authorities”. The same Court also enforced an arbitration award of the American Arbitration Association despite its lack of reasons.<sup>69</sup> The decision states that: “the fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by foreign legislative and judicial authorities”. The distinction between domestic and international public policy has also been considered in Italy by the Court of Appeal of Genoa, in *Efxinos Shipping Co. Ltd. v. Rawi Shipping Lines Ltd*, which held that:<sup>70</sup>

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<sup>67</sup> The Court of Appeal, North Lebanon, May 29 (1974), *Clunet* 1979, at 414. Cited by, Rubino-Sammartano. M., *op. cit.*, p. 312; See also, Abid el Wahab Al Bahi, *op. cit.*, p. 132 at 136, referring to Article 817 of the Lebanese Law of Civil Procedures of 1983, which does not require the provision of reasons in international arbitral awards, although it is a requirement for national arbitral awards according to Article 790.

<sup>68</sup> The Court of Appeals of Florence judgement of 22 October 1976, *see Yearbook* Vol. III (1978) at 279 (Italy No. 18). Cited by Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 224.

<sup>69</sup> Judgment of 8 October of 1977, *see Yearbook* Vol. I V at 289 (Italy No. 29).

<sup>70</sup> Judgement of 2 May 1980 of the Court of Appeal of Genoa, *Yearbook* Vol. VIII (1983) at 381, 383 (Italy No. 51); also see, Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 224, where several examples to this regard are provided therein: “The French decision in *Denis Coakley Ltd. v. Ste. Michel Reverdy*, judgement of 23 July 1981, *Yearbook* Vol. IX (1984) at 400 (France :Vol. 6), which came to the same conclusion with regard to an English (GAFTA) award; and of similar import and reasoning were the judgement of a Hamburg Court of 27 July 1978, *see Yearbook* Vol. IV (1979) at 266-68 (FR Germany No. 18), and the judgement of 29 January 1983, in *European Grain & Shipping Ltd. v. Seth Oil Mills Ltd.*, High Court of Bombay, *see Yearbook* Vol. IX (1984) at 411, 414 (India No. 9).

“... it appears to be no longer contrary to Italian public policy to recognise a foreign award which does not contain reasons, provided that the parties have agreed in advance that reasons shall not be given”.

To the same extent, the Paris Court of Appeal in *Compagnie d'Armement Maritime*<sup>71</sup>, held that: “the lack of reasons does not affect international public policy and that therefore it is a ground for nullity only of domestic awards”. Also, the district court of Nancy in France, on November 14, 1955 refused to declare an arbitral award enforceable, since it did not give any reasons. The Nancy Court of Appeal reversed this judgement, considering that the lack of reasons, although contrary to a rule of French procedural law, was not contrary to *ordre public international* in France.<sup>72</sup> The Court of Cassation rejected the appeal made against this judgement, where it states that “taking into account the wide powers granted to English courts and which allow them to intervene in arbitration procedures ... the lack of motives in the award rendered in the case was not, in itself, contrary to French *ordre public*.”

Finally, mention should be made to the situation when the arbitral tribunal makes serious mistakes in the reasoning of the award. For instance, where the reasoning is in contradiction with the decision. This situation had occurred before the Supreme Court in Sweden in *GNMTC v Gotaverken*<sup>73</sup>, where the Libyan respondent, “GNMTC” opposed an ICC award<sup>74</sup> because the reasoning of the award was contradictory. However, the Swedish Supreme Court refused this objection on the ground that the New York Convention does not allow a review of the merits of the award.

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<sup>71</sup> *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation*, Court of appeal of Paris, April 28 (1976), *Rev. Arb.* 1978, at 154. Cited by, Rubino-Sammartano. M., *op. cit.*, p. 311.

<sup>72</sup> Cass. Civ., un 14, 1960 *Rev. crit. Dr. int. prive* 1960, 393, *J.C.P.* 1961. II. Cited by, Rene David. *op. cit.*, p. 322.

<sup>73</sup> *GNMTC v. Gotaverken*, Supreme Court, August 13, 1979 (Sweedeen no.1). Cited in Van den Berg, *op. cit.*, p. 271.

<sup>74</sup> Award of April 5, 1978, *Yearbook* Vol. VI (1981), p. 133.

The conclusion that can be drawn in this part is that the prevailing trends are to enforce foreign arbitral awards that do not contain reasons, as long as the parties have agreed not to include reasons in the arbitral award.<sup>75</sup> Therefore, if the parties have clearly agreed to exclude reasons from the arbitral award and the law which governs the arbitration procedures allows this, then the award should be recognised and enforced. This is regardless of whether or not giving reasons is a fundamental requirement under the law of the country of enforcement. However, one should also consider that courts of many jurisdictions may still not have had experience with international commercial arbitration. They may consider that providing an award with reasons is a fundamental requirement for the enforcement of an award to ensure that the award does not conceal a violation of public policy, or that the lack of reasons in the award was intended to cover some neglect of the defendant's rights. Therefore, arbitrators are advised to consider that enforcement of the award might take place in a country that does not provide a clear determination in this regard. Even if enforcement will take place in countries which do not require the provision of reasons in arbitral awards, arbitrators have been urged to provide reasons in the awards, which they issue. This was emphasised in *Trave Schiffahrts GmH v. Ninemia corp*<sup>76</sup> where Sir John Donaldson M.R. stated that:

"The giving of reasoned awards is to be encouraged, for, as was said at para. 26 of the Commercial Court Report on Arbitration (1978) (Cmnd. 7284): 'The making of an award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality'."

Also in *Bermer Handelsgesellschaft mbH v. Westzucker GmbH*, Lord Justice Donaldson provided a useful guidance. He said that:<sup>77</sup>

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<sup>75</sup> See Van den Berg, *op. cit.*, p. 380-382 and cases cited therein; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 301. He considers this tendency as part of the modern trend towards the application of international public policy rules.

<sup>76</sup> *Trave Schiffahrts GmH v. Ninemia corp* [1986] 802 at 808 Q.B. [Court of Appeal].

<sup>77</sup> *Bermer Handelsgesellschaft mbH v. Westzucker GmbH* (No. 2); (1981) Lloyd's Rep. 130 CA; also see, Geoffrey Beresford Hartwell, "The Reasoned Award in International Arbitration," *Internet address*: (<http://www.hartwell.demon.co.uk/intaward.htm>), p. 1.

“No particular form of award is required .... all that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen, and should explain succinctly why in the light of what happened, they have reached their decision and what that decision is.”

However, arbitrators are not required to give all the details in the arbitral award. What is required here is to provide the award with persuasive reasons, “concise as possible and limited to what is necessary, according to the nature of the dispute”.<sup>78</sup>

### III. Lack of Impartiality

Lack of impartiality is a ground according to which a party to arbitration can challenge a nominated or appointed arbitrator. The challenge can be raised in any of the different stages of the arbitration process.<sup>79</sup> A challenge to remove an arbitrator may take place after nominating the arbitral tribunal but prior to the issuance of the final arbitral award<sup>80</sup> or after that, by challenging the resulting award before a competent authority in the country of origin.<sup>81</sup> A party can also challenge the enforcement of a foreign arbitral award for the lack of

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<sup>78</sup> See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 391; John Parris, *Arbitration Principles and Practice*, *op. cit.*, p. 141; also see, D. Mark Cato, *op. cit.*, pp. 104-110.

<sup>79</sup> See for example Article 12 (1) of the Model Law.

<sup>80</sup> The competent authority before which such challenge takes place differs according to the applicable procedural rules which the parties have been selected. For example, if they have selected rules of an international constitution, then challenging a prospective arbitrator should be made according to such rules. See for example, Article 11. 1 of the ICC Rules, which provides that challenging the appointed arbitrator, should be made before the ICC Court, by the submission to the secretariat of a written statement specifying the facts and circumstances on which the challenge is based; see also, Article 10.2 of the LCIA Rules; Article 18 of the Egyptian law of 1994; See also Article 13 (2) of the Model Law; Section 24 (1) of the English 1996 Act, which concerns the removal of an arbitrator during the arbitration proceedings; *Damond Lock Grabowski v. Laing Investments (Bracknell) Ltd*, (1992) 60 BLR 112; *Save and Prosper Pensions Ltd v. Homebase Ltd* (Ch D) [2001] L. & T.R. 11.

<sup>81</sup> For example, lack of impartiality is a ground to challenge the award under Section 68 (2) of the English 1996 Act for “serious irregularity affecting the tribunal, the proceedings or the award”. Section 68 (2) subsections (a) to (i) provide an illustration to what can be considered as “serious irregularity”, according to which a court may consider the arbitration procedures containing substantial injustice to one of the parties, the most important of which in this regard is subsection (a)

impartiality of an arbitrator which, according to the central interest of this study, will be examined under Article V (2)(b) of the New York Convention.<sup>82</sup>

The court of enforcement may refuse to enforce a foreign arbitral award if one of the parties proves to the court that the award is based on a lack of impartiality because the appointed arbitrator has a personal interest in the dispute, or was biased towards one of the parties. Under the New York Convention, such a challenge can only be established under Article V (2)(b) on the grounds of public policy, as Article V (1) does not contain a clear basis for such action.<sup>83</sup> This is also due to the doctrine of Natural Justice, which establishes that an adjudicator has a duty to act without bias, fairly, in good faith and judiciously.<sup>84</sup> Therefore, the impartiality and independence of an arbitrator is a basic principle of justice in

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which refers to “failure by the tribunal to comply with section 33 (general duty of tribunal)”. Section 33, imposes on an arbitrator mandatory duties which he cannot disregard, particularly in paragraph (1)(a) which provides that: “The tribunal shall- a- act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.”

<sup>82</sup> One should take into consideration that raising this ground before the Court of Enforcement must be based on circumstances that were not previously known to the party who is raising this ground to refuse enforcement of the award. See, *AAOT Foreign Assoc. Technostoryexport v. International Dev and Trade Services Inc.*, No. 97-9075 (2d Cir. Mar. 23, 1998). In challenging the enforcement of an arbitral award on the ground that enforcement of the arbitral award was rendered by a corrupt tribunal and would therefore violate the public policy of the United States. The Second Circuit held that “the law precludes attacks on the qualifications of arbitrators on grounds previously known by a party but not raised until after the award has been rendered. By remaining silent during the arbitral proceedings despite knowledge of possible corruption, a party waived the right to object to the award at the enforcement stage”. Cited in International ADR web site address, (<http://www.Internationaladr.com/judicial.htm>), IADR Ref. No. 129.

<sup>83</sup> Although that Article V (1)(d) is designed to govern the situation which relates to the composition of the arbitral tribunal, as it provides that enforcement of an award could be refused if “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” However, this does not provide a direct ground to refuse the enforcement for lack of impartiality; see W. Michael Tupman, *op. cit.*, p. 26 at 39; See Van den Berg, *op. cit.*, p. 377; Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 210.

<sup>84</sup> See for example, Section 1 of the English 1996 Act. It confirms the importance of providing the parties with an impartial and fair arbitration. It could be inferred from Section 1 that this right is one of the main principles of the 1996 Act. It provides that: “The provisions of this Part are founded on the following principles, and shall be construed accordingly - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”; also see Article 10 of the Universal Declaration of Human Rights, which provides that: “Everyone is entitled



arbitration, which implies the duty on the person who acts as an arbitrator to undertake serious responsibilities to the parties as well as to the public, notwithstanding that this is also part of the arbitrator's ethical obligations.

Before examining the possibility of refusing to enforce foreign arbitral awards on the grounds of lack of impartiality and independence, one should take into consideration that there are many circumstances that have to be considered in order to determine this issue, which vary from case to case. In this regard a distinction should be drawn between two circumstances. The first relates to the existence of justifiable doubts about the impartiality or independence of the arbitrator himself (for example, by communicating with only one of the parties in the absence of the other or to the exclusion of the other, including the receiving of evidence and/or argument from one side in the absence of the other).<sup>85</sup> The second depends on the existence of circumstances that may create doubts about the impartiality of an arbitrator, for instance, if the chairman or sole arbitrator is of the same nationality of one of the parties.<sup>86</sup> Also one may consider that under the procedural law in some countries, there

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in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

<sup>85</sup> See *London Export Corporation Limited v. Jubilee Coffee Co. Limited* [1958] 1 Lloyd's Rep. 197; *Woodridge Timber Ltd v. Branttorps Travaru* (1982) The Times 14 June; also see, Henry P. De Vries, *op. cit.*, p. 69. He states that: "... the failure to obtain such standards of behavior is a breach of a fiduciary duty, a serious procedural defect which may result in the setting aside of the award"; Judith O'Hare, "The Denial of Due Process and the Enforceability of CIETAC Awards under the New York Convention, the Hong Kong Experience," 13 *J. Int. Arb.*, (December 1996), p. 180; Andrew and Keren, *op. cit.*, p. 117.

<sup>86</sup> See Article 6.1 of LCIA Rules of 1998, which provides that: "Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise"; also Article 9.5 of the ICC Rules of 1998; Article 6.4 of the Cairo Regional Centre for International Commercial Arbitration (CRCICA); also Article 11 (5) of the Model Law 1994 requires from a court (or other authority) if it has been asked to appoint an arbitrator to consider: "any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties"; Michael A. Calvo, "The Challenge of the ICC Arbitrators. Theory and Practice," *J.Int.Arb.*, 15(4):63-72, 1998, 69. He states that in one case the



are mandatory requirements that concern the composition of the arbitral tribunal which aims to guarantee the impartiality of the arbitrators, such as the requirement that an arbitral tribunal should be composed of an uneven number of arbitrators, or that all arbitrators should participate in the deliberation when rendering the final award or finally, that arbitrators should be nominated in the arbitration agreement. It could be argued here that such requirements might affect the impartiality of arbitrators without necessarily being based upon a positive attitude from the appointed arbitrators. The following material will deal with the first scenario, followed by an explanation of the second type.

### **A. Impartiality and independence of arbitrators**

Impartiality means that an arbitrator should not have any personal interest either by being biased in favour of one of the parties or in relation to the issues in the case.<sup>87</sup> The concept of independence indicates some past or existing relationship of the arbitrator either with one of the parties or with their lawyers, either business, professional or social, which would influence his decision.<sup>88</sup> Therefore, independence relates to the relationship between the arbitrator and the parties; impartiality relates primarily to the relationship between the arbitrator and the subject-matter of the dispute.<sup>89</sup>

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court decided to appoint a Hungarian Chairman for arbitration between British and Yugoslav parties. The British claimant opposed this direct appointment, claiming that the nationality of the Chairman provokes a violation of the balance of the contract and of required neutrality.

<sup>87</sup> Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 220; Van den Berg, *op. cit.*, p. 377; Huang Yanming, "The Ethics of Arbitrators in CIETAC Arbitrations," *J.Int.Arb.*, 12(2):5-17, (1997), p. 10; also see, *Catalina (Owners) v. Norma (Owners)* (1938) 61 Ll. L. Rep. 360, D.C.

<sup>88</sup> W. Michael Tupman, *op. cit.*, p. 29.

<sup>89</sup> See, *Metropolitan Properties Co. (F.G.C) Ltd. Lannon* [1969] 1 Q.B. 577. In which Lord Denning said: "A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a direct pecuniary interest in the subject matter. Second, bias in favour of one side or against the other."

Generally, the responsibility of proving the partiality or lack of independence of an arbitrator is on the party who claims the existence of one or more of such circumstances. Some legal systems may require a party to prove the 'actual bias' on the part of the arbitrator, by proving that the arbitrator is in fact incapable of carrying out his office in an impartial manner.<sup>90</sup> In other legal systems, such as the English law, it would be sufficient to prove a so-called 'imputed bias'.<sup>91</sup> For example, if in the circumstances of the case that any right-minded person, a "reasonable man", would conclude from the arbitrator's conduct that there was a real likelihood of bias on the part of the arbitrator or that his relationship with one of the parties is close enough to be objectionable.<sup>92</sup>

If an arbitrator thinks that a reasonable man might take this view then he should disclose to the parties any facts or circumstances which might question his impartiality. The arbitrators' obligation to disclose any circumstances that may prejudice their impartiality is

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<sup>90</sup> *AT&T Corp v Saudi Cable Co (CA)* [2000] 2 All E.R. (Comm) 625.

<sup>91</sup> See, *Dublin & County Broadcasting v. Independent Radio and TV Commission & Others*, 12 May 1989, (unreported case). In this case, Murphy J. said at p. 13 that: "Certainly it does seem to me the question of bias must be determined on the basis of what a right-minded person would think of the likelihood, of the real likelihood of the prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill informed and did not seek to direct his mind properly to the facts... If it is shown that there is on the facts circumstances which would lead a right-minded person to conclude that there was a real likelihood of bias, then this would be sufficient to invalidate the proceedings of the tribunal." Cited in, D. Mark Cato, *op. cit.*, p. 58; also see, *R v. Cough* (1993) A.C. 646; *Save and Prosper Pensions Ltd v Homebase Ltd* (Ch D) [2001] L. & T.R. 11. The court decided to apply as an objective approach "the standard of the reasonable man", where the court decided to consider the circumstances that constitute a real danger of bias.

<sup>92</sup> The English courts have applied this test in several cases, see *Hagop Ardahalian v. Unifert International SA (The Elissar)*, [1984] 2 Lloyd's Rep 84, at 89; *Bremer Handelsgesellschaft mbH v. ETS Soules et Cie* [1985] 1 Lloyd's Rep 160; *Tracom SA v. Gibbs Nathaniel (Canada) Ltd*, [1985] 1 Lloyd's Rep 586; see Clive M Schmitthoff, *op. cit.*, p. 230 at 234; also see the judgement of Griffiths J. in *Corrigan v. The Irish Land Commission* [1977] I.R. 327. The court provided that: "A person in a judicial or quasi-judicial capacity in a matter which is otherwise within his jurisdiction may be disqualified from hearing that matter by reason of actual or presumed bias on his part. However, before such disqualification can take place, there must be a 'real likelihood' of bias"; also see, *Rex (Taverner) v. Justice of County Tyrone* [1909] 2 I.R. 763, in regard to the necessary bias Lord O'Brien L.C.J. said (at p. 768) that: "By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias."

important in order to avoid the appearance of bias in their conduct.<sup>93</sup> This includes the duty of disclosing all details that an arbitrator believes that are important to be disclosed to the parties. An arbitrator must also inform the other arbitrators of the same tribunal of these circumstances<sup>94</sup> but unlike the parties, an arbitrator of the same tribunal cannot challenge the appointment of other arbitrators, as this right is confined to the parties. The only procedure that an arbitrator can do if he disagrees with the appointment of another arbitrator is to withdraw from the arbitration procedures.<sup>95</sup>

The circumstances which must be disclosed by an arbitrator are those which may put the arbitrator in a state of mind where the arbitrator becomes willing to rule contrary to what he would otherwise have ruled. Therefore, arbitrators are required to disclose to the parties any previous or present relation the arbitrator has with the parties, or any interest in the outcome of the dispute. One should consider here that national laws do not include detailed information of what should be disclosed by the arbitrators.<sup>96</sup> Nevertheless, some of the

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<sup>93</sup> Disclosing such circumstances could be made by submitting a written statement of independence, for example, Article 7.2 of the ICC Rules provides that: "Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them." The burden of proof of disclosure falls on the arbitrator, however, if a party claims that there has been a fact that may affect impartiality, then the responsibility of proving it will rest on that party. See, Stephen R. Bond, "The Selection of ICC Arbitrators and the Requirement of Independence", 4 *Arb. Int.*, p. 300, 307 (1988).

<sup>94</sup> In this regard Canon II (D) of the Code of Ethics of 1977 provides that: "Where more than one arbitrator has been appointed, each should inform the others of the interests and relationships which have been disclosed."

<sup>95</sup> For example, in arbitration between the United Kingdom and Saudi Arabia, the arbitrator which was nominated by the United Kingdom resigned because of the obvious lack of independence of the Saudi nominee. The latter passed notes to the Saudi agent during the sittings of the tribunal, and had rehearsed certain witnesses prior to the giving of their evidence. See J. Gillis Wetter, *The International Arbitral Process* [The *Buraimi Oasis* Arbitration], International Commercial Arbitration, The Foundation Press, INC. (1997), p. 565; Martin Hunter, "Ethics of the International Arbitrator," 53 *Arbitration* (1987), p. 219 at 221; D. Mark Cato, *op. cit.*, p. 59.

<sup>96</sup> National laws some times provide examples of what sort of circumstances that are important to be disclosed by an arbitrator, mainly that which relates to the arbitrators' status. For example, Article 16

international arbitration institutions may provide in their rules examples to guide arbitrators as to what they should disclose, for example, Canon (I) of the Code of Ethics provides that:<sup>97</sup> “arbitrators in performing their duties have to uphold the integrity and fairness of the arbitration process”. In paragraph (D) the code provides several examples of what type of circumstances arbitrators are required to disclose:<sup>98</sup>

“After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest.”<sup>99</sup>

Due to the parties’ freedom to agree on the procedure for the appointment of the arbitral tribunal and to choose the members of the arbitral tribunal by themselves, a practical problem may exist in international commercial arbitration. It is common to find in international commercial arbitration a previous relation between an arbitrator and the party who appointed

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of the Egyptian law provides: “1. The arbitrator cannot be a minor, under guardianship, have been deprived of his civil rights by reason of a judgement against him for a felony or misdemeanour contrary to honesty or due to a declaration of his bankruptcy; unless he has been restored to his status.” Also, in paragraph (3) it provides that: “The arbitrator’s acceptance of his mission shall be in writing. When accepting, he must disclose any circumstances which are likely to cast doubts on his independence or impartiality.”

<sup>97</sup> The Code of Ethics of 1977.

<sup>98</sup> See also the Code of Ethics for Arbitrators of The Chamber of National and International Arbitration of Milan, Web Site address: <http://www.mi.camcom.it/eng/arbitration.chamber/etic.htm>.

<sup>99</sup> See Canon II of the 1977 Code of Ethics, *op. cit.*, which also provides that an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. See also the AAA Fact Sheet, Web Site address, <http://www.adr.org>, in which it provides as guidelines for the exercise of arbitrator discretion in this area that: “the following circumstances were deemed sufficient by the courts to require vacatur of the award on the ground of partiality: Relationship of consanguinity within six degree (e.g. second cousins); Business dealings which are significant, ongoing, or regularly conducted; Close social relations or friendships.”

him.<sup>100</sup> This is the case especially where the arbitration is administered by a trade association, as arbitrators are likely to be chosen from a small circle of member merchants who regularly do business with each other. In other situations a party may appoint his counsel to be one of the arbitrators with the view of having his own advocate within the tribunal. In such situations the nominated arbitrators may find himself under the pressure of the party who nominated him. However, this should not affect the arbitrator's impartiality. The arbitrator's relationship with the party nominating him should be based upon an independent professional relationship, since although an arbitrator provides his professional services in return for a fee, his position is very different from that of an employee of the party. An arbitrator owes no general duty to such a party as his relationship with the party nominating him is temporary, terminating once the professional work for which his services have been retained has been completed.<sup>101</sup>

If a previous relationship existed between an arbitrator and one of the parties, then the arbitrator will be obliged to disclose all details about this relationship to the other party, in

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<sup>100</sup> Stephen R. Bond, *op. cit.*, p. 308. He reported that: "the most common basis for refusal by the ICC Court to confirm or appoint a prospective arbitrator is a past or present direct professional link between the arbitrator and a party or between a business associate of the arbitrator and a party or an entity connected to a party"; also see the 1977 Code of Ethics. Canon VII clearly endorses the view that a non-neutral arbitrator (party-appointed) "may be predisposed toward the party who appointed him"; In *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), the Supreme Court of the United States set aside an arbitral award for the reason that a close business connection existed between "neutral arbitrator" and a party to arbitration that was not disclosed to the other party. The court held that: "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Cited in, Henry P. De Vries, *op. cit.*, p. 70.

<sup>101</sup> D. Mark Cato, *op. cit.*, p. 58.



order to avoid any doubts about his impartiality and independence. For example, when submitting his disclosure an arbitrator should give details about:<sup>102</sup>

“The nature of this relationship; whether the relationship is in the past, present, or anticipated in the future; the duration of relationship (from when to when); whether business is being conducted directly or indirectly; whether the disclosed relationship is professional, social or familial; the extent of contact--daily, weekly, monthly, yearly; and, the contact event (e.g., business meetings; occupying space in the same building; consultation; legal professional representation; professional or trade association meeting or committee work; intimate social gathering; large group social gathering; etc.)”

If the arbitrator has disclosed to the parties all circumstances that may cause concerns about his partiality and neither of the parties raised any questions having being informed about these circumstances, then the lack of independence or impartiality cannot be used as a basis for challenging the arbitral award.<sup>103</sup> One should consider here two exceptional situations: the first is when one of the parties becomes aware of new circumstances which affect the arbitrator's impartiality after the appointment has been made.<sup>104</sup> The second situation is when a party waives his right to object; for example, if he accepted that the other party may call the arbitrator alone to produce books of accounts, he cannot then object to the arbitrator on the grounds that there had been a private meeting between the arbitrator and the other party<sup>105</sup> or if he participated in the proceedings following the arbitrator's appointment.<sup>106</sup> However, if parties are allowed, in some situations, to waive their right to

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<sup>102</sup> See the AAA Fact Sheet, Web Site address, (<http://www.adr.org/>).

<sup>103</sup> If a prior relationship is disclosed before or during the arbitration and a party not object at the time, the right to oppose enforcement on this ground is waived. See W. Michael Tupman, *op. cit.*, p. 26 at 48; see also, Art. 12 (2) of the Model Law; *Eckersley v. Mersey Docks* [1894] 2 QB. 667.

<sup>104</sup> This ground could be raised by a party against the arbitrator appointed by that party or in whose appointment he has participated. See for example, Article 12 (2) of the Model Law; Article 18 (2) of the Egyptian law of 1994; Abdul Hamid El Ahdab, “The New Egyptian Act...,” *op. cit.*, p. 78.

<sup>105</sup> *Hamilton v. Bankin* (1850) 64 ER 703; (1850) 3 De G. & Sm. 782; *Shield Properties & Investments v. Anglo-Overseas Transport Co*, (1985) 273 E.G. 69.

<sup>106</sup> *Rustal Trading Ltd. v. Gill & Duffus SA*, [2000] 1 Lloyd's Rep. 14; [2000] C.L.C. 231. In this case *Rustal* applied to have the award set aside on grounds of serious irregularity pursuant to the Arbitration Act 1996 Section 68 of the 1996 Act, contending that the arbitrator's impartiality was in doubt due to his involvement in a recent and unusually acrimonious dispute involving much the same



object on the arbitrator's acts, as in the above example, then this should not lead to the presumption that a party can, by agreement, give up his right to challenge the impartiality and independence of an arbitrator. Parties are not allowed to exclude by their agreement the fundamental rights which are protected by the principle of due process.<sup>107</sup>

The most important issue that has to be considered when claiming grounds for refusing to enforce a foreign arbitral award is the distinction between national and international arbitration. In this regard, it has been reported that the doctrinal trends give more consideration to disputes that involve elements of international commerce.<sup>108</sup> For example, the duty of an arbitrator to disclose all the circumstances that may raise questions about his impartiality has been considered with more liberal understanding in cases that relate to international commercial arbitration. This is due to the modern approach which calls for more consideration being given to the specific character of international commercial arbitration.

This has been considered in *Fertilizer Corp. of India v. I.D.I. Management, Inc.*<sup>109</sup> The US district court was reluctant to refuse to enforce an award under the New York Convention. In this case the defendant learned only after the award had been rendered that the arbitrator appointed by the plaintiff had been its counsel in at least two other legal proceedings. Although public policy generally favoured "full disclosure of any possible

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personalities as in the present case. The court dismissed the application on the ground that *Rustal's* submission that it was unaware of the arbitrator's continued involvement in the case until after publication of the award was rejected because it could, with due diligence, have made the discovery earlier.

<sup>107</sup> See in this regard W. Michael Tupman, *op. cit.*, p. 26 at 52. In his view, "Parties to an arbitration agreement could not violate public policy by providing for the appointment of an arbitrator who is less than independent."

<sup>108</sup> Stephen M. Schwebel and Susan G. Lahne, *op cit.*, p. 210.

interest or bias ...whenever one is in a position to determine the rights of others”, the US district court held that: “... the ‘stronger public policy’ in favour of international arbitration must prevail to enforce the award in this case, particularly because non-disclosure had not otherwise tainted the proceedings”.

Other cases similarly reveal that the existence of a previous relationship between a party and the arbitrator does not necessarily lead to the refusal of enforcement of a foreign arbitral award. This has been applied in a decision made by the French courts in *Denis Coakley Ltd. v. Sle. Michel Reverdy*.<sup>110</sup> The award was attacked under Article V (2)(b) of the New York Convention for considerations of violation of public policy on the basis that, subsequent to rendering the award, an arbitrator had acted as counsel for one of the parties when the award was on appeal before an appeal board constituted under the Arbitration Rules of the Grain and Feed Association. The French Court<sup>111</sup> upheld the award on the grounds that the arbitration panel on which the arbitrator had served “was definitively no longer competent at the time he acted as counsel for the party, and because such a manner of proceeding is in conformity with English law adopted by the parties”. The court considered that Article V (2)(b) of the New York Convention referred to international public policy, thus confirming that: “the public policy governing the enforcement of foreign arbitral awards is not domestic public policy, but the public policy of international law of the state where the decision is

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<sup>109</sup> *Fertilizer Corp. of India v. I.D.I. Management, Inc.*, 517 F. Supp. 948 (1981); 530 F. Supp. 542 (SD Ohio 1982), *Yearbook* Vol. VIII (1983) at 419 (USA No. 41). Cited in W. Michael Tupman, *op. cit.*, p. 26 at 49.

<sup>110</sup> *Denis Coakley Ltd. v. Sle. Michel Reverdy*, Court of Appeal of Reims (Civil Chamber), Judgement of 23 July 1981, *Yearbook* Vol. IX (1984) at 400 (France No. 6). Cited in, Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 210; Jacques Werner, “The Independence Of Arbitrators in Totalitarian States,” 14 *J. Int. Arb.*, 1, (March 1997), p. 141.

<sup>111</sup> See, *Ibid*, the judgement of 23 July 1981 of the Court of Appeal of Reims.

invoked". The court asserted that the award rendered by the appeal arbitration board did not violate "the French concept of international public policy or due process."<sup>112</sup>

Another example is the decision of the American Court of Appeals for the Fifth Circuit in *Imperial Ethiopian Government v. Baruch Foster Corp.*<sup>113</sup> The respondent, *Baruch Foster*, a United States corporation, had opposed the award because the arbitrator, the French professor Rene David, was disqualified to act as an arbitrator since between 1954 and 1958 he had drafted the Ethiopian Civil Code. The Court of Appeals rejected the contention of *Baruch Foster* by referring to Prof. David's integrity and reputation, and by adding that *Baruch Foster* had failed "to come forward with anything tending to show that the claim was asserted in good faith and for any reason other than delay." The US Court of Appeal rejected that grounds as the court recognised that any relationship between the arbitrator and the *Ethiopian Governmen* had ended 16 years prior to the date of the award.<sup>114</sup>

The above examples demonstrate the modern trends to the challenge of foreign arbitral awards on the ground of lack of impartiality or independence. The test that has been followed shows a considerable awareness of the importance of recognising that in international commercial arbitration arbitrators may belong to a certain economic group or may have a professional relationship with the parties<sup>115</sup>, which does not justify any influence on the

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<sup>112</sup> This decision was based on the French legislative distinction between international arbitration and domestic arbitration. See French Code of Civil Procedure, Book IV, Arts. 1442-1507; Stephen M. Schwebel and Susan G. Lahne, *op cit.*, pp.210 - 211; Ven den Berg, *op. cit.*, pp. 377-380.

<sup>113</sup> U.S. Court of Appeal (5<sup>th</sup> Cir.), *Imperial Ethiopian Government v. Baruch Foster Corp.* (U.S. no. 10); see also, Van den Berg, *op. cit.*, p. 376.

<sup>114</sup> The court also stated that: "Professor Rene David... is one of the most respected comparative lawyers in Europe and throughout the world and a "man of honour and absolute integrity", to whom bias therefore would not be easily imputed under any circumstances"; also see, W. Michael Tupman, *op. cit.*, p. 47.

<sup>115</sup> See the decision of the Court of Appeal of Basle (Obergericht of Basle, June 3, 1971 (Switz. No. 5)). The court rejected the objection that the arbitral tribunal could not be considered independent because all arbitrators came from the circle of merchants in raw materials, whilst no person represented the leather manufacturing industry. The Court observed that the Swiss Supreme Court has

arbitrator's mind, or create an actual appearance of bias.<sup>116</sup> This shows that foreign arbitral awards are subject to narrower public policy rules than the national standards, where examining the validity of a foreign arbitral award on this ground requires a careful analysis of each case separately, according to the surrounding circumstances and according to the applicable law requiring the disclosure.

## **B. Other Procedural Requirements in the Arbitral Tribunal**

There is another category of circumstances that could affect the validity of arbitral awards whereby mandatory procedural rules are breached without that breach being based upon the arbitrators' attitude. For example, some legal systems may require that an arbitral tribunal should be composed of uneven number of arbitrators, which is a condition that aims to assure the impartiality of the arbitrators. Also, some legal systems require that all arbitrators should participate in the deliberation when rendering the final award. Finally, some legal systems insist on nominating the arbitrators in the arbitration agreement as a formal condition to constitute a validly composed arbitral tribunal.

In some legal systems, these are public policy requirements. However, there have been substantive changes in such legal systems, which have started to distinguish between national and international arbitration, and in practice national courts have recognised the importance of distinguishing between the mandatory procedural requirements under their national laws,

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been very reluctant to accept the composition of an arbitral tribunal in international commercial arbitration as a violation of *public order*. The fact that an arbitrator belongs to a certain economic group, according to the Court, did not justify considering him *beforehand* as not being independent. The Court stated that the crucial question is whether in *a specific case* an arbitrator has been dependent on one of the parties. The latter had not appeared to be the case for the arbitral tribunal in question", cited in Van den Berg, *op. cit.*, p. 378.

<sup>116</sup> William W. Park, "Neutrality, Predictability and Economic Co-Operation," 12 *J.Int.Arb.*, (1995), p. 99 at 106.

and the requirements of international public policy. This will be illustrated in the following topics.

## 1. Uneven number of arbitrators

Many legal systems require that an arbitral tribunal should be composed of an uneven number of arbitrators and consider this requirement as a mandatory procedural rule.<sup>117</sup> Such requirement can also be found under the rules of international arbitration institutions, for example, in Article 8 (1) of the ICC Rules; and Article 5 of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which provide that an arbitral tribunal can be composed of either a single or of three arbitrators.

Accordingly, an arbitration agreement that includes a clause providing for appointing an even number of arbitrators might be considered as null and void, and therefore arbitral awards that have been made by a tribunal composed of an even number of arbitrators can be refused for violating the due process in the country of enforcement.<sup>118</sup> Van den Berg illustrated this attitude from the point of view of these countries:<sup>119</sup>

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<sup>117</sup> See for example, Article 15 of the Egyptian law of 1994, which provides that: "The arbitral panel consists, by agreement between the parties, of one or more arbitrators. In the absence of such agreement on the number of arbitrators, the number shall be three"; Mohamed I.M. Aboul-Enein, "The Development of International Commercial Arbitration Laws In the Arab World," a paper presented to the conference of "International Commercial Arbitration" Cairo. January 28. (2000), p. 8. He states that: "the Egyptian law requires, at risk of nullity, that if more than one arbitrator is to be appointed, their number should be odd"; also see, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 162, where the authors refer to examples from several legal systems.

<sup>118</sup> This is the case in Egypt, an award that results from a decision of an uneven number of arbitrators is considered null and void for considerations of public policy. See Ahmad Abu al Wafa, *op. cit.*, p. 172; Ashraf Al Rifaie, *op. cit.*, p. 241; Abdul Hamid El Ahdab, "The New Egyptian Act...", *op. cit.*, p. 65 pp 97-98. He states that: "it is a ground to set the award aside for being contrary to an imperative provision of the law such as a choice of an even number of arbitrators"; One should mention here that this is not a requirement under the Shari'a law. Mohamed I.M. Aboul-Enein, "Liberal Trends in Islamic Law (Shari'a) on Peaceful Settlement of Disputes," 2 *Journal of Arab Arbitration* (2000), p. 1 at 7. He states that: "The study of the arbitrated cases according to Islamic Law proves that there are

“In these countries it is considered that if the arbitrators are even in number, they will almost always be appointed by the parties and be inclined to defend the point of view of the party who nominated him. This inclination is less likely if there are three arbitrators, one of which is not appointed by one party alone.”

Nevertheless, some legal systems have adopted more flexible rules. For example, Section 15 (2) of the English Arbitration Act of 1996 considers as valid the parties' agreement to appoint two arbitrators or any other even number of arbitrators.<sup>120</sup> If such agreement was made then, unless the parties have otherwise agreed in writing, a court under Section 15 (2) could appoint an additional member to act as presiding arbitrator.<sup>121</sup> This has also been confirmed in Section 16 (4) which provides that: “If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.”

The diversity of procedural rules which concern the number of arbitrators, may create a problematic situation for the enforcement of foreign arbitral awards. A foreign arbitral award that was made under a procedural law which permits the parties to compose the arbitral tribunal of an even number of arbitrators, may encounter such problems if enforcement of the award takes place in another country, and that country considers the composition of the tribunal of an even number of arbitrators as contrary to its national mandatory rules.

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no restrictions on the number of arbitrators. The two parties to a dispute may appoint one or more arbitrators. The number of arbitrators may be odd or even. The matter was always left to the parties.”

<sup>119</sup> Van den Berg, *op. cit.*, p. 380.

<sup>120</sup> This is also the trend in other common law countries, also in France, Belgium, and Netherlands. See Rene David, *op. cit.*, p. 227; V. V. Veeder, *op. cit.*, p. 29; the same may also exist in practice under the procedural rules of certain trades, such as, the Rules of Refined Sugar Association. See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 52 and p. 204; Van den Berg, *op. cit.*, p. 380.

<sup>121</sup> Section 15 (2) of the English law of 1996 provides that: “Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.”



Therefore, such grounds could arguably be established upon Article V (2)(b) of the New York Convention.

Raising such ground could also be made under Article V (1)(d) of the New York Convention, since Article V (1)(d) provides that an award may be refused if: “The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”. However, one should recognise here that refusing to enforce a foreign arbitral award under Article V (1)(d) could only be established if one of the parties proves to the court that the composition of the arbitral authority was not in accordance with the arbitration agreement or the law of the country where the arbitration took place. Therefore considering this ground under Article V (2)(b) is important for the court of enforcement, as the court could still refuse the enforcement if such composition violates the mandatory rules of its national law and may refuse the enforcement of the award according to Article V (2)(b) of the Convention.

Due to the importance of international commercial arbitration, an international public policy rule has emerged in the domain of enforcement of foreign arbitral award, which requires the national courts to accept the enforcement of a foreign arbitral award that was made by even number of arbitrators. In this regard, several legal systems distinguish between domestic and international public policy.<sup>122</sup> In accordance with this distinction courts have accepted the need to enforce foreign arbitral awards made by two arbitrators, as long as the

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<sup>122</sup> See, Rubino-Sammartano. M., *op. cit.*, p. 312. He reported that the Italian courts consider this matter as concerning the Italian domestic public policy and not the Italian international public policy.

arbitral panel composition is valid according to the applicable rules of the particular arbitration procedures.<sup>123</sup>

Moreover, one could say that it is irrational to consider the requirement of composing the arbitral tribunal of an odd number of arbitrators as a necessary requirement to guarantee their impartiality, since the lack of impartiality of an arbitrator could only be established upon the existence of certain circumstances which require to be proved, which differ from case to case. Also, one should consider that, in practice, parties may appoint two arbitrators and choose one of them as an umpire, which could be considered as appointing a sole arbitrator. Therefore, an award which results from a decision of even number of arbitrators should be enforced as long as the two arbitrators were impartial and have examined all the evidence after giving each of the parties a fair opportunity to present his case or defences.

## **2. All arbitrators should participate in the deliberations**

It is generally acknowledged that if the arbitral tribunal consists of more than one arbitrator then all arbitrators must participate in the deliberation.<sup>124</sup> Some legal systems consider the failure of all arbitrators to deliberate at the same time and place as a ground to annul the award for considerations of public policy.<sup>125</sup> This is intended to guarantee that the

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<sup>123</sup> See, Van den Berg, *op. cit.*, p. 380. He states that: "The even number of arbitrators is not a ground for refusing enforcement of the award on account of public policy if an arbitral tribunal composed of an even number of arbitrators is valid in the country in which, or under the law of which, the award was made."

<sup>124</sup> One should mention here that most of legal systems do not require in an award to be made by the unanimous decision of all arbitrators, as an award could be made by the majority decision, but it requires that an award must be made after a deliberation in which all arbitrators have taken part. In this regard see Rene David, *op. cit.*, p. 315. He provides that: "unanimity is required in only a few laws, for example, Brazil, Peru and Venezuela."

<sup>125</sup> Aktham El kholy, *op. cit.*, p. 326. He reported that this was the case under Article 507 of the Egyptian procedural law of (1968): "The Egyptian procedural law authors tend to consider as public

award was made after a true exchange of views among all of the arbitrators, and to ensure that justice has been considered by taking into consideration the opinion of all arbitrators.<sup>126</sup>

The first question that may arise here is whether or not arbitrators are necessarily required to be physically present during the deliberations at the same time and place?

This question was considered in *Russell on Arbitration* where it is said that:<sup>127</sup>

“All must make award together. Where there are two or more arbitrators, all should execute the award at the same time and place. If they do not, the award may be invalidated, but as the objection is one of a formal character, if no other objection is shown, the court may remit the award to the arbitrators for correction.”<sup>128</sup>

However, nowadays, the practice in international arbitration shows that an arbitrator can draw up a draft and send it to the other or others for their consideration and comments.

After a draft is agreed, it then can be sent round and signed by each arbitrator separately.<sup>129</sup>

This situation was considered in *European Grain v. Johnston*.<sup>130</sup> In this case one arbitrator signed a blank form of award which was filled in when the remaining two arbitrators reached a decision. The sellers in this agreement accepted part of the award then sought to set aside that part of the award that contradicts with their interest, holding them in default. In an appeal

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policy the implicit requirement under the same Article 507 related to the need for all arbitrators to participate in the deliberations.”

<sup>126</sup> See, Kenneth Smith Carlston, “The Process of International Arbitration,” (1972). Cited in *International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes.*, (1997) The Foundation Press, INC, International Commercial Arbitration, p. 953.

<sup>127</sup> Russell, F. Watson, Anthony., *Russell on Arbitration*, 19th ed. Stevens and Sons, (1979), p. 247; See also, UN Doc. A/40/17, para. 246.

<sup>128</sup> In *Lord v. Lord* (1855) 5 E. & B. 404, each of two arbitrators signed the award but did so at a different time and place. Coleridge J. said, at p. 406 that: “It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment.”

<sup>129</sup> *Hiscox v. Outhwaite* [1992] 1 A.C. p. 562; [1991] 3 W.L.R. p. 297; [1991] 3 All E.R. p. 641; [1991] 2 Lloyd’s Rep. P. 435.

<sup>130</sup> *European Grain v. Johnston* [1983] Q.B. 520; [1983] 2 W.L.R. 241.

process, Lord Denning M.R. stated that:<sup>131</sup> “whenever all [arbitrators] have signed, each must be regarded as having assented to it, even though each signed it at a different time or place from the others. That principle applies to an award of arbitrators just as it does to a written agreement or any other document to be executed by two or three people.” However, in accordance to the facts of the case the court held that:

“... where persons were appointed to act together as arbitrators they were required to reach a decision jointly; that it was misconduct on the part of the arbitrator to sign the award form in blank without taking part in the decision process and for the other arbitrators to endorse his action, that accordingly the whole award was defective but, since the sellers had taken the benefit of the award, they were not entitled to have it set aside.”

The second question that needs to be examined here is, whether or not the absence of the signature in the award could be construed as a procedural defect, which indicates that not all the arbitrators took part in the deliberation, and therefore a sufficient ground to refuse the enforcement of a foreign arbitral award for considerations of violating a national procedural mandatory rule.

Legal systems differ at this point, for example, Article 43 of the Egyptian law of 1994 provides that: “If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of all arbitrators shall suffice, provided that the reasons for which the minority did not sign is stated in the award”. One can recognise that Article 43 of the Egyptian law of 1994 requires to state in the arbitral award the reasons for which the award is not signed by the dissenting arbitrator.<sup>132</sup> The latter is a mandatory requirement, which aims to prove that all arbitrators have participated in the deliberations. Whereas, under Section 52 of the English

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<sup>131</sup> *European Grain v. Johnston* [1983] Q.B. at 525.

<sup>132</sup> See also Article 31 of the Model Law, provides: “The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”

Act of 1996, for example, parties have the freedom to agree on the form of the award, they are allowed to agree on this issue. In the absence of the parties' agreement, Section 52 provides that the award can be "signed by all the arbitrators or all those assenting to the award". Accordingly, unless otherwise agreed by the parties<sup>133</sup>, an arbitrator who does not assent to the award does not have to sign it.<sup>134</sup> Also under Section 52 of the English 1996 Act it is not a requirement to specify the reasons for which a dissenting arbitrator did not sign the award.<sup>135</sup>

It has been reported that the requirement of providing the dissenting opinion in the arbitral award is a matter that differs between the Civil Law and Common Law systems. Such a requirement contradicts with the practice of the civil law system, as one is not authorised to mention the dissident opinion because this is considered to be a violation of the secrecy of deliberations.<sup>136</sup> In this regard, Laurent Levy explained the view of such legal systems.<sup>137</sup> He provides that: "The goal of *secret du delibere* [confidentiality of deliberation] is to preserve the collegial nature of the courts, to keep the judges immune from the parties' grudges, and so to bolster their independence."<sup>138</sup> On the other hand, under the common law system,

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<sup>133</sup> If such requirement exists according to the parties' agreement and a dissenting arbitrator refused to sign the award, this will be considered as a breach of the arbitrator's duty under Section 33. See *Cargill International SA v. Sociedad Iberica de Molturacion SA* [1998] 1 Lloyd's Rep 489.

<sup>134</sup> Andrew and Keren, *op cit.*, p. 170.

<sup>135</sup> See Rene David, *op cit.*, p. 317. He states that: "...this mention is not required in the Common Law countries nor in various countries of Latin America"; see *Bank Mellat v. GAA Development & Constriction Co.*, 2 Lloyd's Rep. 44, 49-51 (1988).

<sup>136</sup> Abdul Hamid El Ahdab, "The New Egyptian Act...", *op. cit.*, p. 78; Ronald Bernstein, "General Principles, in Handbook of Arbitration Practice," (1987), p. 101; W. Laurence Craig, Et A.L. "International Chamber of Commerce Arbitration 332-35 (2d ed. 1990). Cited in the "International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes," (1997) The Foundation Press, INC., Directing Editor, David L. Shapiro.

<sup>137</sup> Laurent Levy, "Dissenting Opinions in International Arbitration in Switzerland," 5 *Arb. Int.*, (1989), 35-39.

<sup>138</sup> However, according to Laurent Levy's opinion, "Such considerations are largely foreign to arbitration where the parties appoint the judges." *Ibid.*, p 39.

providing the dissenting opinion in the arbitral award is not a violation to the secrecy of deliberation.

Therefore, one should consider here that there are countries which consider mentioning the dissenting opinion in the award as a violation to the secrecy of the deliberation, while other countries do allow mentioning the dissent opinion and other countries are required by mandatory rules to state the reasons for which the dissenting arbitrator did not sign the award. The diversity between the procedural laws in this regard may lead to obstruct the enforcement of foreign arbitral awards as the application of such requirement to the enforcement of foreign arbitral awards would be unacceptable.

There is a growing tendency to enforce foreign arbitral awards even if the law of the country where enforcement takes place requires rendering the award according to the deliberations of all arbitrators, particularly if one of the arbitrators had deliberately attempted to frustrate the arbitration by refusing to participate in the deliberations.<sup>139</sup> Also, one should consider Article V (1)(d) of the New York Convention as it provides that enforcement of the award may be refused if the arbitration procedure was not in accordance with the rules chosen by the parties or to the law of the country where arbitration took place. Accordingly, determining the validity of the award should be determined according to the law which governed the arbitration proceedings. For example, if the parties agree to apply the LCIA Rules, then, according to Article 26.1, the award can be signed “by the arbitral tribunal or

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<sup>139</sup> Such requirement may encourage an arbitrator, who considers himself as the representative of the one of the parties, to deliberately refuse to participate in the deliberations or to sign the award if he recognises that the majority decision is not in favour of the interest of the party who nominated him. Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 370 and 401; also see Klaus Peter Berger, *op. cit.*, p. 612. He states that: “The dissenting arbitrator is not allowed to go further than communicating his legal opinion on the merits of the case, e.g. by giving an authentic commentary and interpretation of the award as so to provide “his party” with indications on how to attack the award before the courts of the seat of arbitration.”



those of its members assenting to it”, and according to Article 26. 2 of the LCIA Rules if one of the arbitrators refused to attend the deliberation or refused to sign the award then, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator’s failure to participate in the making of the award.<sup>140</sup>

Due to the need to adopt an approach that corresponds to the latest trends in international commercial arbitration, the Cairo Court of Appeals took a step forward by considering the application of such mandatory rules in a less restrictive manner as required under the notion of international public policy. In a decision on 11 August 1996 the Court decided that non-signature of the arbitral award did not mean that deliberation of the arbitral panel did not take place<sup>141</sup>, but it only meant that the concerned arbitrator did not approve the award after the deliberations in the case under review. The Court also indicated that the arbitral award was not obliged to outline the reasons for the refusal by an arbitrator to sign the arbitral award if he did not mention those reasons himself.

### **3. The requirement of nominating the arbitrators in the arbitration agreement**

First, a distinction should be made here between the requirement of disclosing the names of the arbitrators in the arbitration agreement and the requirement of informing the parties of the identity of the selected arbitrators. The latter relates to the proper notice of the appointment of the arbitrators, which is subject to Articles V (1)(d) and V (2)(b) of the New

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<sup>140</sup> Article 26.2 of the LCIA Rules: “If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator’s failure to participate in the making of the award.”

<sup>141</sup> The Cairo Court of Appeal’s decision on 11 August 1996 in Commercial Case No. 61 of the 113th judicial year. Cited in, Tarek F. Riad, “Arbitration and legal Business Environment in Egypt,” 17 *J.Int. Arb.*, (2000), p. 169.

York Convention, as already noted in this chapter. This was considered by the Court of Appeal in Germany on 1 June (1976), in regard to challenging of an arbitral award because the parties were not informed of the identity of the appointed arbitrator.<sup>142</sup> The arbitral award related to a dispute between a Danish buyer and a Federal Republic of German seller and was made under the rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. According to the procedures of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade, “the President of the Committee would select the arbitrators to act on a specific case from a publicly available list, but the parties would not be informed of the identity of the specific arbitrators selected. The resulting award would be signed only by the President.” The German Court of Appeal refused to recognise the award under Article V (2)(b) of the New York Convention, finding that recognition would have been against the public policy of the Federal Republic of Germany. The court emphasised the importance of informing the parties with the names of the selected arbitrators since this clarifies any objections against the impartiality of a selected arbitrator and guarantees fair arbitration procedures. Furthermore, the court considered this requirement as a “fundamental principle of both FR Germany and international legal order”. The court stated that:

“The institution of challenge can be effective only if the parties have the possibility of knowing the names of the judges or arbitrators who take part in the decision of the dispute in question. Only if this condition is fulfilled, can it be investigated whether the judge or arbitrator who takes part is partial and can his participation be prevented. In international law also, great importance is attached to the disclosure of the names of arbitrators: in the New York Convention (Art. V, para. 1 under b) as well as in the European Convention (Art. IX, para. 1, under b), the lack of notification of the appointment of the arbitrators is mentioned expressly as a ground for refusal of recognition and enforcement.”<sup>143</sup>

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<sup>142</sup> The Cologne *Oberlandesgericht*, Federal Republic of Germany, see Yearbook Vol. IV ( 1979) at 258; (FR Germany No. 14). Cited in, Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 212 – 213; Christopher B. Kuner, *op. cit.*, p. 82.

<sup>143</sup> Also see, Van den Berg, *op. cit.*, p. 378 providing that the name of the arbitrator is a prerequisite to be known to the parties. If that is not done, a party is deprived of the possibility to investigate whether the arbitrator lacks impartiality and to challenge him.

Nominating the arbitrators in the arbitration agreement on the other hand is a requirement that concerns the validity of the composition of the arbitral tribunal. Some legal systems consider the failure to disclose the name of the arbitrator in the arbitration agreement as a reason to refuse the enforcement of the arbitral award. This was the situation in Egypt prior to the 1994 law<sup>144</sup>, where this issue occurred before the Egyptian courts on several occasions with reference to the requirement of Article 502 (3) of the Civil Procedural Law of 1968. Article 502 (3) considers not nominating the arbitrators in the arbitration agreement to be a violation of public policy, and therefore a serious grounds for refusing to enforce a foreign arbitral award.<sup>145</sup> Article 502 (3) of the Civil Procedural Law necessitates the direct involvement of the parties to select the arbitrators by names; it provides that:

“Without prejudice to the provisions contained in special legislative acts, the arbitrators have to be nominated either in the arbitration agreement or in a separate agreement.”

In *Rolaco Holdings S.A. and Casino Palace Port Said v. The Mohafazat of Port Said and Suez Canal Authority*<sup>146</sup>, the Port Said Court of First Instance ordered the stay of ICC arbitral proceedings to take place in Egypt on the ground that the contract’s provision for arbitration was “at variance with the established judiciary rules in the Arab Republic of Egypt which require the two parties’ agreement on the name of the arbitrator.”

This was the case until the Egyptian Court of Cassation made a distinction between the application of this rule to national arbitration and international arbitration.<sup>147</sup> The Egyptian

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<sup>144</sup> Under Article 17 of the Egyptian arbitration law of 1994 it is no longer a requirement to provide the names of the arbitrators in the arbitration agreement.

<sup>145</sup> See, Aktham El kholy, *op cit.*, p. 323; Ashraf Al Rifaie, *op. cit.*, p. 227.

<sup>146</sup> *Rolaco Holdings S.A. and Casino Palace Port Said v. The Mohafazat of Port Said and Suez Canal Authority*, ICC Document 410/6618. Cited in Stephen M. Schwebel and Susan G. Lahne, *op. cit.*, p. 215.

<sup>147</sup> The English courts have had the chance to express their opinion in this regard as early as 1894 in *Hamlyn & Co. v. Talisker Distillery*. [1894] A.C. 202, at p. 214. Lord Watson provided that:

Court of Cassation was confronted with this issue on two occasions: The first was when the Alexandria Court of Appeal refused to enforce an award on the basis that the arbitrators who rendered the award (in England, in one case, and in France, in the other case) had not been nominated by the parties themselves in conformity with Article 502.3 of the Egyptian Code of Civil Procedures. The highest judicial court rejected that argument by stating in its first decision of 26 April 1982 that:<sup>148</sup>

“It is unacceptable to claim the exclusion of the applicable English law under the pretext that it violates Article 502 (3) Procedures, even if we assume that this is true. The possibility of excluding the rules of the foreign applicable law is conditioned according to Article 28 of the Civil Code upon the proof that these rules are contrary to public policy in Egypt, i.e., in conflict with social, political, economic or moral bases which relate to the supreme interests of the community. Thus, it is not sufficient that the foreign rules contradict a mandatory legal text.”

The second decision was made on 13 June 1983, which stated that:<sup>149</sup>

“The validity of the arbitration agreement had to be decided under the law of the place of arbitration and that Article 502 (3) of the Code of Civil Procedures . . . does not relate to public policy.”

#### IV. Concluding Remarks

Several legal systems contain lists of what can be considered as fundamental procedural rules, the violation of which would justify refusing the enforcement of a foreign arbitral award. It is difficult to specify and examine all issues that can be considered as requirements

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“The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy.”

<sup>148</sup> *M.V. Lela v. Gulf Contractors*, Court of Cassation (Egypt), April 26, 1982, (Case No. 714 - judicial year 47), *Mediterranean and Middle East Arbitration Quarterly* 1988, No. 2, at 1. See, Aktham El kholy, *op cit.*, p. 325; Rubino-Sammartano. M., *op. cit.*, p. 234.

<sup>149</sup> *Misr Insurance v. M.V. Dominion Trader*, Court of Cassation (Egypt), June 13, 1983, (Case No. 1259 - judicial year 49 ), *Mediterranean and Middle East Arbitration Quarterly* 1988, No. 2, at 8. See Aktham El kholy, *op cit.*, p. 325; Rubino-Sammartano. M., *op. cit.*, p. 235.

of procedural public policy because these requirements vary from state to state<sup>150</sup>; therefore it is possible that a defence of denial of due process, which may find success in one jurisdiction, may be unsuccessful in another.<sup>151</sup> National procedural public policy rules may include formal requirements, the violation of which may not necessarily lead to a vital denial of justice to the parties.

Mandatory procedural conditions that do not rest upon principles of universal acceptance can be found in many legal systems. For example, some legal systems may require the person undertaking the position of arbitrator to be of a particular nationality, religion or gender. Some of the Muslim countries like Saudi Arabia, Indonesia, Kuwait, in particular, do not permit woman to be appointed as arbitrators because women are precluded from adjudicating disputes.<sup>152</sup> The international consensus according to the vast majority of countries, and therefore what could be considered as the international public policy rule, is

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<sup>150</sup> See, Andrew and Keren, *op cit.*, p. 289; Rubino-Sammartano. M., *op, cit.*, p. 303, stating that: "Procedural public policy plays a role in arbitral proceedings which differs depending on the applicable procedural law."

<sup>151</sup> Paul Friedland and Robert Hornick, "The Relevance of International Standards in the Enforcement of Arbitration Agreements under the New York Convention," 6 *The American Review of International Arbitration*, (1995), p. 151.

<sup>152</sup> Rene David, *op. cit.*, p. 246; Abudl Hamid El-Ahdab, "Saudi Arabia Accedes to the New York Convention," *J. Int. Arb.*, p. 87 at 91; Mhaidib Al-Mhaidib, *Arbitration as a Means of Settling Commercial Disputes, Special Reference to the Kingdom of Saudi Arabia*, Thesis (Ph.D.) University of Edinburgh (1997). However, El Ahdab indicates that there are exceptions to the conditions which are required in an arbitrator according to Shari'a law, that is when arbitration takes place in a non-Moslem country even between two Muslims. See Abdul Hamid El Ahdab, "General Introduction on Arbitration...", *op, cit.*, p. 12; also, Abdul Hamid El Ahdab, "The New Egyptian Act...", *op. cit.*, p. 77. This has been confirmed by Mohamed Aboul-Enein, by depending on the case of the Caliph "Omar Ibn Al-Khattab" who appointed a female called El-Shafae as a judge in the market to decide cases that may arise between parties in disputes in the market. The simple analogy would be that if the woman is eligible to be a judge, she could also be appointed as an arbitrator if she satisfied the requirements for being a judge. Mohamed I.M. Aboul-Enein, "Liberal Trends in Islamic Law...", *op. cit.*, p. 1 at 8. It is worth mentioning that the Egyptian law of 1994 provides an explicit provision in this regard in Article 16. 2 which does not require an arbitrator to be of any gender or nationality unless otherwise has been agreed upon by the parties: "It is not a requirement for an arbitrator to be of a given gender or of a specific nationality, unless otherwise agreed upon between the parties or has been provided by law."

that the arbitrator's gender does not constitute a sufficient reason to refuse the enforcement of a foreign arbitral award, since such ground could not establish a justifiable claim that a vital interest in justice has been violated.

The procedural public policy issues that have been addressed in this chapter prove that the general trend is to construe the Convention's public policy defence narrowly by confining the application of this ground to the minimum standards of justice as known in the practice of international commercial arbitration.

Requirements of purely national public policy rules should not have any impact on the enforcement of foreign arbitral awards. Refusal to enforce a foreign arbitral award for considerations of procedural public policy should only be based on the requirements of justice between the parties, that may lead to denial of substantial justice, and where there are matters which may gravely affect the validity of the award or the right to proceed under it. Accordingly, national courts are required to give more consideration to applying common sense rather than insisting on applying a formal rule, which may not be suitable for the requirements of international commercial arbitration. Courts are also required to take into account in their decision-making, that not all of their national rules form part of international public policy, and that international arbitral awards should not be exposed to procedural traditions and concepts of their national legal systems. This does not mean that all judicial review of international arbitral awards should be abolished, since domestic courts are required to preserve the integrity of the arbitral process. The only question the courts should be concerned with when they are requested to review a foreign arbitral award is whether or



not the procedural requirements have been respected and whether there has been a serious violation of due process.<sup>153</sup>

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<sup>153</sup> Henry P. De Vries, *op. cit.*, p. 52.

## **CHAPTER SIX**

# **PUBLIC POLICY IN RELATION TO THE SUBJECT MATTER OF THE DISPUTE**

## **Chapter Six**

### **Public Policy in relation to the Subject Matter of the Dispute**

This subject matter of a dispute may raise various grounds for non-enforcement of a foreign arbitral award. It is important to mention that the public policy element here may overlap with the notion of arbitrability.<sup>1</sup> Public policy in this sense could be invoked in order to examine whether the award relates to certain kinds of disputes that by their subject matter are excluded from arbitration. Public policy could also be invoked where the outcome of the arbitrators' decision contradicts with interests that have significant importance to the state in which enforcement is required. Therefore, the breadth of this topic vary, depending on how the relevant state and their enforcing authority interprets the public policy ground. Attention will be given, therefore, to particular examples according to what have occurred in practice before national courts of different legal systems.

The analysis will be prefaced by a review of the various definitions of public policy, identified in chapter two.<sup>2</sup> Several writers interpret, and court decisions understand public policy as reflecting the fundamental moral, political and economic interests of every community. The subject matter of disputes has a bearing on most of these interests. This chapter will therefore examine the application of public policy under the following headings.

#### **I. Issues of morality**

#### **II. Political Issues**

#### **III. Economic Issues**

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<sup>1</sup> The relationship between public policy and arbitrability has been examined in chapter one. See Chapter One, at p. 54.

<sup>2</sup> See Chapter Two, at p. 64.

## I. Issues of morality

### A. Generally

It is natural to find moral standards and cultural principles that are peculiar to every community. It is also common to find rules of law that stem from moral principles, which impose on the members of a given community orders and obligations that they cannot derogate from by their autonomous agreements. Such mandatory moral rules may vary from place to place and from time to time.<sup>3</sup> It follows that any agreement of dubious morality could be nullified for considerations of public policy, in the community in which such mandatory moral rules are invoked.<sup>4</sup> However, it is important to consider that there is no clear-cut definition of what could be regarded as a moral principle that could establish (under the head of morality) an obligation that would compel the members of a given community to comply. For example, it would be difficult to determine whether or not a certain custom or a religious principle has an imperative importance that lies at the heart of the legal system in a given community. Therefore, it will be difficult for an arbitral tribunal, and in a later stage for the court where enforcement of the award is sought, to determine the validity of an international commercial transaction according to its coherence and consistency with such variable national moral standards. No one can determine on behalf of a given culture what is acceptable and what is offensive to the moral standards as comprehended in that culture. It

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<sup>3</sup> See Karl-Heinz Bockstiegel, *op. cit.*, p. 182. He states that: "The values and standards of communities are not stable, they change and develop. So does public policy since it is derived therefrom."; For example, gambling or prostitution, where the validity of such agreements may vary from country to country; Dennis Lloyd, *op. cit.*, pp. 101 and 113; Van den Berg, *op. cit.*, p. 376; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 290; Mahmoud Hashim, *op. cit.*, p. 148.

<sup>4</sup> See Dennis Lloyd, *op. cit.*, p. 104. He refers to the basic principal which provides that: "one cannot derogate by individual agreements from laws which concern public order or good morals."

will also be difficult to establish moral standards that suit all nations and various cultures from different backgrounds.

With these difficulties in mind, it could be argued that determining the validity of a foreign arbitral award could only be based upon the national moral standards in the country in which enforcement is sought. However, one should recognise that international moral standards do also exist. This could be recognised if we consider that there are certain agreements or activities which are prohibited world wide because they violate standards of morality that are common to all, or at least to the vast majority of countries. For example, agreements that violate human rights such as trafficking in human beings, or agreements that include employment of mercenaries or terrorist actions<sup>5</sup>, organised crime, the trafficking of arms<sup>6</sup> or drugs<sup>7</sup> and corruption.

In the domain of international commercial arbitration, it has long been recognised that international arbitrators are obliged to not put into effect obligations the ultimate purpose of which is contrary to international moral standards. Also, enforcement of foreign arbitral awards could be refused if the subject matter of the dispute violates public policy rules and morality of the international community. To illustrate the effect of such international moral standards on the enforcement of foreign arbitral awards, I will focus on one of the common

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<sup>5</sup> On terrorism, see, for example, General Assembly of the UN, "Resolution 34/ 145 (Measures to prevent intentional terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms, ...)", ILM XIX (1980), 533; General Assembly of the UN, "Drafting of an International Convention .Against the Taking of Hostages", ILM XVIII (1979), 1456; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 306.

<sup>6</sup> See, for example, The Chemical Weapons Convention of 1993; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 585.

<sup>7</sup> There are several UN Drug Control Conventions. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; See, web site address, (<http://www.undcp.org/resolutions.html>); also see, UN General Assembly, "Resolution 393/141 (International Campaign Against Traffic in Narcotic Drugs)"; "Resolution 39/ 142 (Declaration on the Control of Drug Trafficking and Drug Abuse)" and "Resolution 39/143 (International Campaign Against Traffic in Drugs)", ILM XXIV (1985) 1157; Klaus Peter Berger, *op. cit.*, p. 676.

examples which has occurred in international commercial arbitration; this example relates to bribery, corruption<sup>8</sup>, or what is known as the purchase of influence in international trade.

## **B. Corruption and purchase of influence in international trade**

Corruption is immoral behaviour whereby one of the parties obtains a contract that he would not be able to obtain without resorting to bribery, the illegal use of personal influence and corrupting governmental officials.<sup>9</sup> In international commercial relations corruption is regarded as an illegal act which violates the fundamental principles of contractual morality.<sup>10</sup>

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<sup>8</sup> One should consider that bribery is somewhat different from corruption, where a bribe is to try to make (someone) do something for you by giving them money, presents or something else that they want, where corruption is a dishonestly by using a position or power to achieve a personal advantage. However, both situations may lead to the same effect, which is to obtain benefits from a person in a public position.

<sup>9</sup> Steven R. Salbu, "Transnational Bribery: The Big Questions," 21 *J. INTL. L. BUS.* (2001), p. 435; Halsbury's Laws of England, 4th ed., vol. 9 (1974), para. 394, p. 268, where bribery is examined under the heading "Agreements Injurious to Public Life"; Chitty on Contracts, 25th ed. (1983), para. 1048, p. 557, where bribery is examined under the heading "Objects Injurious to Good Government: Domestic Affairs"; Cheshire Fifoot and Furmston, *The Law of Contract*, 11th ed. (1986), p. 355, where bribery is examined under the heading "A Contract Liable to Corrupt Public Life"; In *Montefiore v. Menden Motor Components Company, Limited*, 1918, 2 K.B. p 241, the court decided that: "It is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void."

<sup>10</sup> The effect of corruption on the economic and social development of countries around the world has been recognised by several international conventions. See, the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, signed on 17 December 1997, and came into effect on 15 February 1999; also see, Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 293. He referred to the studies, recommendations and resolutions of the United Nations: "Bribery in contracts has been studied by the United Nations either as a subject in it self or in the context of other subjects such as the activity of transnational corporations; See "Resolution 3514 of the General Assembly, Resolution 2014 (LXI) of the Economic and Social Council (Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions)", ILM (1976). 1222; "UN Commission on Transnational Corporations: Report of the Working Group on the Formulation of a Code of Conduct" ILM XV I ( 1977), 709; "Economic and Social Council: Report of the *Ad Hoc* Working Group on Corrupt Practices in International Commercial Transaction", ILM XV I (1977), 1236; "Report of the Committee of the Economic and Social Council on an International Agreement on Illicit Payments", ILM XVIII (1979), 1025; "Draft Code of Conduct of the UN on Transnational Corporations", ILM XXII (1983), 177 and XIII (1984). 626.



In international commercial arbitration, disputes that involve the bribery of a foreign government official can be considered arbitrable and therefore could be determined by arbitral tribunals.<sup>11</sup> This may be due to the difficulty of distinguishing between illegal agreements which include the use of influence in international trade and other legal transactions that involve legal commissions, where the latter type of agreements are common in international trade. Therefore, arbitrators could examine the validity of such agreements to determine whether or not the contract is illegal on the ground of international public policy.<sup>12</sup> This was the view of the arbitral tribunal in ICC case No. 1110<sup>13</sup>, the claimant, an Argentinean party, claimed for a commission that relates to a contract obtained by a British Corporation in Argentina. The contract was based on an earlier agreement according to which the claimant was to receive 10% of the value of £400,000 in return for his intervention with the Argentinean authorities in favour of the English company. The arbitrator recognised that a major portion thereof was to be used to bribe employees of the then Argentine government. Whilst neither party raised the issue of public policy, the arbitral tribunal held that:

“...it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.”<sup>14</sup>

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<sup>11</sup> See, *Northrop Corp v. Triad*, 593 F. Supp. 928 (1984), where commission (or bribery) was paid to foreign government officials. In the latter case the USA court did not find bribery inarbitrable on grounds of public policy; also see, Judgement of Mr. Justice Colman in *Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd.*, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd’s Rep. 111; [1998] C.L.C. 409.

<sup>12</sup> It has been established in Chapter Three that international arbitrators are not guardians of a particular national law, therefore, an international commercial arbitrator could apply moral standards which are common to the community of nations. See Chapter Three, at p. 147.

<sup>13</sup> ICC case No.1110/1963, *Yearbook Commercial Arbitration* (1996), p. 47; also see, Julian Lew, *Applicable Law International Commercial Arbitration*, *op. cit.*, p. 553; Julian Lew, “Determination of Arbitrators’ Jurisdiction..”, *op. cit.*, p. 84; Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 293.

<sup>14</sup> The tribunal further concluded that: “Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice, be it national courts or arbitral tribunals, in settling their disputes.”

In another ICC case<sup>15</sup>, the arbitral tribunal decided that the payment of bribes by a British firm was the cause of the obligation undertaken by a French firm. The tribunal decided to nullify the contract on the ground of its violation of international public policy. It held that:

“This solution is not only in keeping with internal French public policy, it is also dictated by the concept of international public policy as is recognised by the majority of states.”<sup>16</sup>

The above two examples demonstrate the condemnation of corruption by international arbitral tribunals under the duty of protecting the interest of the international commercial community, whereby arbitrators could examine the merits of the dispute and determine the illegality of the subject matter of the dispute in conformity with the requirements of international public policy.

However, national courts in the country of enforcement will always have the last word, as they can review the arbitral award, and accordingly may revoke the award if it failed to take into consideration the invalidity of the parties' agreement due to bribery or corruption. Even if the arbitral tribunal had nullified an agreement on the ground of breach of public policy, national courts could vacate the arbitral award if it appears that the agreement does not breach national public policy. This was the case in *Hilmarton v. OTV* before the Geneva Court of Appeal.<sup>17</sup> The arbitral tribunal considered the circumstances under which the agreement was made and found that the consultancy agreement between the parties was

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<sup>15</sup> ICC No. 3913/1981, I *Collection of ICC Arbitral Awards* (1981), p. 497; Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 292.

<sup>16</sup> The concept of good morals in international commercial relations was also asserted in ICC proceedings Case No. 2730/1982, *Collection of ICC Arbitral Awards* Vol. I (1984), p. 490; ICC case No. 3916/1981, 1982 I *Collection of ICC Arbitral Awards* (1984) p. 507, concerning payment of bribes between French and Iranian parties; Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 292; Rubino Sammartano . M., *op. cit.*, p. 315; Julian DM Lew, “Determination of Arbitrators' Jurisdiction...”, *op. cit.*, pp. 73 and 84.

<sup>17</sup> *Hilmarton v. OTV*. Reported in (1994) XIX *Yearbook* 214; Cited in *ILA Report*, London Conference (2000), *op. cit.*, p. 33.

contrary to public policy, since in order to obtain the contract *Hilmarton* breached the mandatory rules of Algerian law, which prohibit any intervention of intermediaries in the obtaining of a public contract. However, the Geneva Court of Appeal did not consider the contract to be in breach of the public policy of the Swiss law, which was the applicable law to the contract, and therefore overturned the award on the ground that it had been rendered without legal reason.

By contrast, a different view was followed by the English courts in *Westacre Investments Inc. v. Jugoimport - SDPR Holding Co. Ltd.*<sup>18</sup> The court expressed its confidence that if the issue of illegality by reason of corruption was referred to high calibre ICC arbitrators and duly determined by them, it would be entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.<sup>19</sup> In *Westacre v. Jugoimport* case, the issue concerned the enforceability of a Swiss ICC arbitral award, in respect of a 500 million USD contract for the sale of weapons to Kuwait. The award related to an agreement for the supply of arms from Yugoslavia to Kuwait under which it was alleged that bribes had been made to Kuwaiti officials to secure the sale of arms. The defendant *Jugoimport*<sup>20</sup> contended before both the arbitrators and the Swiss Federal Court that the contract was illegal and unenforceable because the agreement violated public policy in Kuwait. The arbitrators rejected these allegations and considered the contract valid. The defendant later sought, before the English court, to introduce new evidence in support of its allegations of bribery.

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<sup>18</sup> *Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd*, [1998] 3 W.L.R. 770; [1998] 4 All E.R. 570; [1998] 2 Lloyd's Rep. 111; [1998] C.L.C. 409.

<sup>19</sup> Unlike the *Hilmarton* case, see above, the court in *Jugoimport* case decided that *Jugoimport* would not be entitled to reopen issues of fact already decided upon by the arbitrators under the Arbitration Act 1975 Section 5(3).

<sup>20</sup> A Yugoslavian state owned company.

The court considered that the dispute has already been litigated and decided by a foreign tribunal as it held that:

“...the arbitrators had considered the allegations and ruled that the contract was not illegal without evidence of incompetence or bad faith that finding would be upheld.”

Furthermore, the court recognised that there is an international public policy rule of priority to be applied, which imposes the duty to recognise the finality of international arbitral awards. The court held that:

“The court deciding on the enforcement issue, would have to consider whether the policy of not enforcing illegal judgements outweighed the countervailing policy of encouraging finality in judgements. The policy of encouraging the enforcement of international arbitral awards should outweigh the policy of discouraging international corruption.”<sup>21</sup>

The above decisions raise an important question; which law should be applied to decide the validity of foreign arbitral awards that involve corruption in international commercial transactions? The following examples shed light on the trend that was followed by several national courts in determining this issue.

In the *Hilmarton* case the Geneva Court of Appeal referred to the public policy of the applicable law to the contract which was, at the same time, the national law of the court.<sup>22</sup>

The English courts have also expressed this view when it was asked to enforce the *Hilmarton* award which has been mentioned above.<sup>23</sup> *OTV* applied to set aside the award before the

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<sup>21</sup> Jugoimport appealed against the court order, but the court dismissed the appeal, it confirmed that: “...notwithstanding that neither Swiss nor English public policy would have countenanced the claim succeeding if bribery had been established, the arbitrators had considered the allegations and ruled that the contract was not illegal. Without evidence of incompetence or bad faith that finding would be upheld.” See, [2000] 1 Q.B. 288; [1999] 3 W.L.R. 811; [1999] 2 Lloyd’s Rep. 65.

<sup>22</sup> *Hilmarton v. OTV*. Reported in (1994) XIX *Yearbook* 214; Cited in *ILA Report*, London Conference (2000), *op. cit.*, p. 33.

<sup>23</sup> *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd*, [1999] 2 All E.R. (Comm), p 146; [1999] 2 Lloyd’s Rep. 222.

English courts, contending, *inter alia*, that enforcement would be contrary to English public policy under section 103 of the 1996 Act because the award assisted the use of intermediaries in an agreement which was prohibited under the law of the place of performance (the Algerian law). The court held, refusing the application, that the arbitral award should be enforced even if the contract would have breached English public policy in that it required a contravention of Algerian law. The court decision considered that the arbitral award had been given effect under Swiss law (the applicable law to the contract) and that it is based on a finding of fact that the contract was not tainted by corruption.

There may also be other circumstances where national courts may determine the validity of such agreements by taking into consideration both their national law and other laws that have close connection with the parties' agreement, such as the law of the country in which the agreement will be performed.<sup>24</sup> This view was followed by the U.S courts in *Northrop Corporation v. Triad Financial establishment*.<sup>25</sup> The Californian Federal District Court refused to enforce an award concerning a contract which involved the payment of commissions to an agent in respect of arms sales to Saudi Arabia. The court established its decision on the grounds that the contract was based on payment of illegal commissions which is contrary to the United States Foreign Corrupt Practices Act of 1977 (FCPA)<sup>26</sup>, and the Saudi Arabian Decree No 1275, of September 17, 1975.<sup>27</sup>

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<sup>24</sup> It reported that in England: "Contracts for the purchase of personal influence, if to be performed in England, would not be enforced on the basis that they are contrary to English domestic public policy. But where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country (as well as of England) that the English court would not enforce it." See the *ILA Report*, London Conference (2000), *op. cit.*, p. 31.

<sup>25</sup> *Northrop Corporation v. Triad Financial establishment*, 593 F Supp 928 (1984). Cited in Julian DM Lew, "Determination of Arbitrators' Jurisdiction...", *op. cit.*, p. 80.

<sup>26</sup> See Internet address: <http://www.ita.doc.gov/legal/fcparev.html>

<sup>27</sup> This trend was also followed in an ICC award (Case No. 4409). An arbitrator was asked to decide upon the legality of certain payments promised as a counterpart for services aiming to facilitate



To determine the validity of commission agreements in relation to the relevant national mandatory rules of a foreign law, the national courts should bear in mind that this may vary from case to case, and could depend upon certain national rules which may prohibit commission in certain fields of trade, for example, commission agreements in relation to oil supply contracts. This view was followed by the English courts in *Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd.*<sup>28</sup> The dispute involved an agreement to pay commission on oil supply contracts. The commission contract was declared void under the laws of Qatar on the basis that its object was contrary to public policy in the state of Qatar. The court distinguished between domestic contracts and international contracts. It held that:<sup>29</sup>

“English courts should not enforce an English law contract which fails to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.”

In addition, the court founded its decision upon the principle of international comity as a suitable reason for the English courts to refuse to enforce international agreements which would raise questions of immorality.<sup>30</sup> The decision explicitly states that: “some heads of

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obtaining a military procurement contract. After adjudicating the dispute, the arbitrator declared that the claimed payments are illegal because they were promised within the framework of an agreement having as its exclusive purpose the corruption of vital institutions that must be kept immune from any possible traffic of influence. In this award, Egyptian law was declared to be the governing law, and accordingly the sole arbitrator relied on the Egyptian domestic concept of nullity for illegal cause as a mandatory rule of national public policy; also see, Aktham A. El Kholi, “The Enforcement of International Arbitral Awards”, *Al- Tahkim Al- Arabi*, Vol. 2, January 2000, p. 20 at 21.

<sup>28</sup> *Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd* [1988] 1 QB 448 at 454; KA 297.

<sup>29</sup> *Ibid.*, [1988] 1 QB., p. 461.

<sup>30</sup> In this case the court referred to Lord Halsbury L.C. in *In re Missouri Steamship Co.* (1889) 42 Ch.D. 321, 336., which demonstrates the English courts attitude in deciding on the validity of agreements that involve issues of immorality. In the *In re Missouri Steamship Co.* case the court held that: “Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it”; Andrew and Keren, *op. cit.*, pp. 296 and 297.



public policy are based on universal principles of morality”.<sup>31</sup> Under the concept of international public policy the court recognised the duty to maintain the minimum standards of morality which oblige the international community to co-operate in order to prevent such evil agreements world-wide.<sup>32</sup>

The cases of corruption demonstrated above imply that an internationally accepted standard of morality does exist, condemning illicit commercial practices in international commercial agreements.<sup>33</sup> The immoral and damaging effect of corruption on the economic and social development of countries around the world requires national courts and international arbitral tribunals to consider this issue as a violation of international public policy.

The delicate problem remains to determine precisely where the line should be drawn between legal and illegal international transactions. Generally, in reaching a conclusion as to whether a particular arbitral award comes within a fully recognised class of situations that will be held to be void as contrary to morality, a judge in the country of enforcement must

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<sup>31</sup> *Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.*, [1988] Q.B. p. 459; also see the decision of the Italian Court of Cassation in *Alarcia Castells v. Hengstenberge e Procuratore general presso la Corte di appello di Milano*, RDIPP XIX (1983), 346. The court stated that: “the respect of international public policy is based first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations”. Cited by Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 277.

<sup>32</sup> Also see, *European Gas Turbines SA v. Westman International Ltd*, 30 Sept. 1993, (1994) *Rev. Arb.* 359, and reported in (1995) XX *Yearbook* 198. The Paris Court of Appeal recognised that: “A contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.”; *ILA Report*, London Conference (2000), *op. cit.*, p. 32; Rosell and Prager, “Illicit Commissions and International Arbitration: The Question of Proof,” 15 *Arb.Int.*, (1999), p. 329.

<sup>33</sup> See in general Pierre Lalive, “Transnational (or Truly International) Public Policy...”, *op. cit.*, p. 291. The writer states that: “arbitral condemnation of corruption may thus be characterised as either the application of a general principle of law ‘recognised by civilised nations’, or as the recognition of a ‘substantive law of necessary application’, or as the resort to a transnational public policy.”

consider all circumstances which relate to the parties' agreement when it was made. For example, consideration should be made to the intention of the parties as whether or not they intended to commit an illegal behaviour, the applicable law to the agreement, the law of the country in which the agreement to be performed and the common practice in international trade relations, where in this regard the distinction between national and international agreements should be considered. Moreover, in arriving at a decision, a judge in the country of enforcement must base his decision upon the most basic notions of morality and justice that are common to all nations or at least to the vast majority of countries, which should be considered as representing the dominant opinion of the international community whose moral ideas should prevail.<sup>34</sup>

## II. Political Issues

The enforcement of a foreign arbitral award may also be questioned under Article V (2)(b) of the New York Convention on the ground that the award contravenes the political stance of the state in which enforcement is required. This could arise if the award involves actions that may threaten the political stance of the state or its good relations with a friendly state, for example, trading with enemy aliens<sup>35</sup>, payment to be made to terrorists, etc.<sup>36</sup> The application of this ground to the enforcement of foreign arbitral awards is a subject of much debate, since political interests vary according to the political environment of each state, therefore this has led to different results.

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<sup>34</sup> ILA Report, London Conference (2000), *op. cit.*, p. 32; Dennis Lloyd, *op. cit.*, p 101.

<sup>35</sup> *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.* [1918] A.C. 260; 34 T.L.R. 208; *Kuenigl v. Donnersmarck*. [1955] 2 W.L.R. 82; [1955] 1 All E.R. 46.

<sup>36</sup> This may also include diplomatic conflicts, hostility acts or the brake of war.

Parties could raise this ground at the early stages before the arbitral tribunal, for example, this could be raised by a party as a defence by claiming that the non-fulfilment of his contractual obligations refers to a political decree which made performing his obligations impossible, such as the situation in boycott sanctions.<sup>37</sup> However, international arbitrators are not obliged to comply with the political orders of a given state as arbitrators are not guardians of a particular national law and they have no allegiance to a particular state.<sup>38</sup> But arbitrators may consider such situation as a '*force majeure*', which may lead to exempt the defaulting party from his obligations on the ground that the situation was beyond his control since it was caused by external circumstances which prevents the performance of his contractual obligation.

This was the case in a dispute that arose between a Soviet Union public corporation (*Sojuzne FtkSPORT*) and an Israeli private company (*Jordan Investment Ltd.*), concerning an agreement for importing oil from Russia into Israel.<sup>39</sup> The dispute erupted when the Soviet Union Government prohibited the exportation of oil from Russia into Israel<sup>40</sup>, and therefore *Sojuzne FtkSPORT* was prohibited from performing its contractual obligations. In accordance with an arbitration clause, which was included in the parties' agreement, *Jordan Investment* started arbitration proceedings claiming for damages from *Sojuzne FtkSPORT* for breaching the importation agreement. *Sojuzne FtkSPORT* encountered these claims and replied that the agreement was cancelled for reasons beyond its control, and that the political decision of the

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<sup>37</sup> Boycott sanctions are political orders that could be taken against a country in order to force it to change its policies. See Iain McLean, "Oxford Concise Dictionary of Politics," *Oxford University Press* (1996), p. 42.

<sup>38</sup> Bernard Hanotiau, "What Law Governs the Issue of Arbitrability?," 12 *Arb.Int.*, No4 (1996), p. 391; Daniel Hochstranger, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 11 *J.Int.Arb.*, (1994), p. 57 at 59.

<sup>39</sup> Domke M., "The Israeli Soviet Oil Arbitration," *American Journal of International Law*, (1959), p. 787; Ibrahim Ahmmad Ibrahim, *op. cit.*, p. 6.

Soviet Union Government made performing its contractual obligations impossible. The arbitral tribunal decided that the breach of the contract was a result of a political decision which prohibited the importation of oil into Israel and that *Sojuzne FtakSPORT* is a separate legal entity from the Russian government, therefore *FtakSPORT* was not responsible for the breach of the importation agreement.

However, on many occasions international arbitral tribunals have declined to rely on political regulations of a given country as reason for revoking the parties' agreement.<sup>41</sup> For example, in ICC proceedings No. 3881/1994<sup>42</sup> an arbitral dispute arose between a Swiss and a German company on the one hand, and a Syrian public body on the other hand. The defendant "the Syrian party" argued that the claimant had breached the Syrian public policy rules in disregarding the Syrian political stance which requires the boycott of Israel. The arbitral tribunal distinguished between public policy and boycott rules, and held that:

"...boycott rules do not have effect on contractual relationships, in addition to that the boycott rule did not apply until the company was put on the black list and until it became official."

Also, an ICC award rendered in 1978<sup>43</sup> involved a dispute between Swedish shipyards and a Libyan buyer. The arbitral tribunal refused to apply Libyan laws and boycott regulations since the contract was subject to Swedish law.<sup>44</sup> The tribunal held that:

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<sup>40</sup> This was based upon a political decision as a result of the war between Israel and Egypt in 1956.

<sup>41</sup> See P. Mayer, *op. cit.*, pp. 285 – 286. The writer gives us an example of certain boycott laws that establish restrictions on the grounds of race and religion. He argues that an arbitrator should, in the name of international public policy, refuse to enforce such mandatory laws because they seek to institute racial or religious discrimination which contravenes the international public policy principles.

<sup>42</sup> Award rendered in ICC proceedings No. 3881/1994, see, Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez, *Collection of ICC Arbitral Awards*, Volume II, (1986-1990), p. 257.

<sup>43</sup> Case Nos. 2978, *Yearbook Commercial Arbitration*, (1981), p. 133; Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 295.

<sup>44</sup> Also see, *A B Gotaverken v. GMTC*, VI *Year book Commercial Arbitration* (1981), p. 133. The arbitrator refused to give effect to the Lebanese Law on boycott regulations in order to justify the refusal to take a delivery of vessels, where the arbitrator came to the conclusion that Swedish law was

“The application of the Swedish law leads to the obvious consequences that the Libyan boycott law and regulations cannot apply to these contracts - except if a special reference is made in the contracts to this boycott law.”

Accordingly, arbitrators may determine whether or not to consider the boycott sanctions of a given state according to the applicable law to the subject matter of the dispute, by examining whether or not the applicable law requires the same boycott sanctions.<sup>45</sup> It is important to draw attention to a distinction that could be considered here between situations where the boycott regulations are imposed by one state against another and the situation when such economic sanctions are imposed by the United Nations Security Council.<sup>46</sup> The latter situation could be regarded as the application of international public policy rules which should be taken into consideration by international commercial arbitrators.

The situation before national courts is different. Unlike international arbitral tribunals national courts are bound by the political situation of the state in which they exercise their jurisdictions. This may require consideration of such delicate matters, as considering the friendly relationships between the state of enforcement and a foreign friendly state. For example, in *Regazzoni v. KC Sethia Ltd*<sup>47</sup> the House of Lords considered the protection of essential interests of a friendly state. The case involved an international contract between a businessman domiciled in England and a businessman domiciled in Switzerland, concerning the exportation of jute from India to South Africa. The agreement was subject to English law,

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applicable and that the boycott rule did not have an effect on the contractual relationship; See Rubino Sammartano . M., *op. cit.*, p. 315.

<sup>45</sup> However, one should bear in mind that such arbitral awards may not be enforced in the countries that order such boycott sanctions or even in other states that may have political interests with that country.

<sup>46</sup> For example, Resolution 661, U.N. Security Council, which imposed mandatory economic sanctions against Iraq and established a committee (the Sanctions Committee) to monitor those sanctions. (S/Res/661). 6 August 1990. See the United Nations Blue Books Series, Volume IX, 168.

<sup>47</sup> *Regazzoni v. KC Sethia*, 1958 A.C. 301; [1957] 3 All E.R. 286; [1956] 2 W.L.R. 204.

but was considered null and void according to the Indian law, which prohibited shipment direct or indirect from India to South Africa following apartheid measures imposed on Indians in South Africa.<sup>48</sup> The following question arose, should the English courts take notice of and give effect to the Indian law in question, given that it was responding to a hostile act directed at another friendly Commonwealth State, or should it not be enforced because it was intended to be of political or penal character?

After examining the nature of the case, the court recognised that the Indian law was not aimed at safeguarding particular or selfish interests of the Indian State but rather to counter racist legislation which was contrary to the fundamental human rights. Accordingly, the court decided that the contract was unenforceable since an English court will not enforce a contract, or award damages for its breach, if its performance would involve doing an act in a foreign and friendly state which violates the law of that state. The court held that:

“...it is not in accordance with English public policy that a foreign and friendly nation should be harmed.”<sup>49</sup>

This question was also discussed in *Dalmia Dairy Industries Ltd v. National Bank of Pakistan*.<sup>50</sup> The dispute erupted as a result of Pakistani decrees declaring any payment to an Indian party illegal. *National Bank of Pakistan* disputed before an ICC tribunal<sup>51</sup> that the arbitrator had become “*functus officio*” from continuing with the arbitration because of the

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<sup>48</sup> In exercise of the powers conferred by the Sea Customs Act, 1878, modified in December 1, 1950, Section 19, the Central Government of India duly made an order on July 17, 1946 prohibiting the taking “... by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa.”

<sup>49</sup> *Regazzoni v. KC Sethia*, 1958 A.C., 301 at p. 309.

<sup>50</sup> *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, C.A.

<sup>51</sup> ICC Case No. 1512/1970, *Yearbook Commercial Arbitration* (1980), p. 174. This dispute arose from the non-performance by a Pakistani bank of a guarantee issued in favour of an Indian company which was made expressly subject to Indian law. The arbitral tribunal was faced with the question of deciding whether the bank was discharged from its obligations as a result of Pakistani decrees declaring any payment to an Indian party illegal because of hostilities between India and Pakistan which had broken out after the guarantee had been issued; see Yves Derains, *op. cit.*, 250.



outbreak of war between India and Pakistan. This objection was rejected by the arbitrator in an interim award in December 1969. In an enforcement proceeding the English Courts rejected the argument that it would be contrary to English public policy to enforce the award because both countries maintained friendly relations with England.

The effect of including political notions in the numerous interpretations of public policy raises several problems. In particular, the courts may readily be used as an instrument of pressure by a dominant political party when in power. Public policy could thus become a badge of discrimination ready to be used by the state courts to protect the perceived innate superiority of the forum's political views. Therefore, it is important to not to rely on political circumstances unless there are reasonable and serious reasons that may affect the vital interests of the state. Therefore, national courts have been reluctant to give effect to political orders as reasons for refusing enforcement of foreign arbitral awards. For example, in *Parsons & Whittemore Overseas Inc. v. RAKTA*<sup>52</sup>, an application to enforce a foreign arbitral award in the United States was made by *RAKTA* (an Egyptian corporation) against *Overseas* (a United States corporation). The two corporations were parties to an agreement relating to the construction of a paper board mill in Egypt. During the six-day Arab-Israeli war, Egypt expelled all Americans except those who would apply and qualify for a special visa. Thereupon, *Overseas* abandoned the project and notified *Rakta* that it regarded itself as excused by *force majeure*, *Rakta* disagreed and obtained an award in its favour. In an enforcement action before the United States Court of Appeal, *Overseas* argued that it was obliged "as a loyal American citizen" to abandon the project as it considered that this conduct was part of its duty to defend national interests, which it argued is integral part of United

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<sup>52</sup> *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir. 1974).

States public policy. The United States Court of Appeal for the Second Circuit held that public policy did not equate with “national policy” (in the diplomatic or foreign policy sense), and it would not refuse to enforce an award in favour of the Egyptian party merely because tensions at that time emerged between the United States and Egypt.<sup>53</sup> The US Court rejected Overseas’ arguments and declined any connection between article V (2)(b) of the New York Convention and Overseas allegations, where it asserted that:

“In equating ‘national policy’ with United States public policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy. Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. To deny enforcement of this award largely because of the United States’ falling out with Egypt in recent years would mean converting a defence intended to be of narrow scope into a major loophole in the Convention’s mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas’ proposed public policy defence.”

The same view was confirmed by the United States courts in *National Oil Corp. v. Libyan Sun Oil Corp.*<sup>54</sup> The court rejected a request to refuse the enforcement of an arbitral award on the ground that the award was in favour of Libya “a state known to sponsor international terrorism”. The court refused to accept this reason as a ground to refuse the enforcement of a New York Convention award. Furthermore, the court pointed out that the United States recognises the government of Libya, had not declared war on it, and had specifically given it permission to bring an action to confirm the award.

The conclusion which could be drawn here is that construing public policy to include concepts of a political nature may seriously undermine the utility of the New York

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<sup>53</sup> Van den Berg, *op. cit.*, p. 364.

<sup>54</sup> A United States case, 733 F. Supp. 800 at 819, *District Court, D. Del, March 15, 1990*, 85 *American Journal of International Law* 178 (1991); *ILA Report, London Conference (2000)*, *op. cit.*, p. 23.

Convention. This could ultimately lead to negative effects on the interests of the state of enforcement, as it would lose the reputation as an attractive forum for international commercial and financial relations, and could thus be deprived of opportunities for (sustainable) economic integration and development.

As was evident from the judicial practice in various jurisdictions, a defence which relies on political reasons as a ground to challenge the enforcement of foreign arbitral awards is increasingly unsuccessful in international commercial disputes. Therefore, unless there are reasonable and serious grounds, that may have a significant impact on the non-negotiable interests of the state, public policy should not be interpreted to expose international commercial relations to the unpredictable political circumstances between states.

### **III. Economic Issues**

#### **A. Generally**

There are two contradictory policies that should be taken into consideration when determining the validity of a foreign arbitral award for its possible violation of the economic mandatory rules of a given state. On the one hand, one should consider the economic strategies which many countries may adopt in order to encourage international investments to come into their territories.<sup>55</sup> To achieve the goals of such economic strategies, countries may

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<sup>55</sup> This could be recognised if we consider the economic strategies of both, developed and under development countries. In general, the economic strategy of the developed countries aim to maintain their advanced level of technological and economy progress; and the economic strategy of under development countries is to strive to meet the standards of the development of international trade and to catch up with the speed of international economy in order to not be left behind.

tend to eliminate any legal barrier that may scare international investments away.<sup>56</sup> The positive effect of such strategies has led to liberalisation as regards the parties' autonomy in international commercial agreements, including recognising the parties' freedom to oust the jurisdiction of national courts in international commercial disputes and resolve their disputes instead by arbitration.<sup>57</sup> On the other hand, countries may impose various limitations to the parties' autonomy on the ground that there are certain commercial activities which may have injurious effects on the economic policy of the state. It is thus inevitable to find national mandatory rules that constitute the substantive content of the economic policy of the state<sup>58</sup>, which aim to protect the economic strategy goals of the state.<sup>59</sup> One of the important limitations that could affect the parties rights in international commercial arbitration is that a state may prohibit the parties from resolving their disputes by arbitration, on the ground that the interest at stake requires special treatment that could only be obtained under the supervision of the national courts.<sup>60</sup>

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<sup>56</sup> This is due to the fact that parties of international commercial relations try to avoid being faced by laws which they may be ignorant of, and to overcome any barriers these laws may pose in the face of their trade.

<sup>57</sup> See Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 103. The writers state that: "A national law which does not permit the free flow of goods and services across national frontiers may not be the most suitable law to govern international commercial contracts and the dispute which may arise from them."

<sup>58</sup> Christopher B. Kuner, *op. cit.*, p. 88. The writer comments that important norms of certain economic policy such as antitrust rules and currency, import and price controls, are considered matters of German public policy.

<sup>59</sup> It has been reported that national courts could also rely on international public policy as a ground to refuse the enforcement of a foreign arbitral award even if the interest which is at stake concerns the national mandatory rules of the state of enforcement. See, *Courreges Design v. Andre Courreges*, 5 Apr. 1990, (1992) *Rev. Arb.* 110. The Paris Court of Appeal stated that: "the rules relating to public control over foreign investment express, via mandatory provisions, the idea of international economic public policy, because these rules aim at preserving, in the public interest, the balance of economic and financial relations with the rest of the world, by controlling the movement of capital across the border." See *ILA Report*, London Conference (2000), *op. cit.*, p. 24.

<sup>60</sup> See, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 138; Christopher B. Kuner, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention," 71 *J.Int.Arb.*, (1990), p. 88.

Accordingly, determining the enforceability of a foreign arbitral award should be based upon establishing a balance between the liberality and freedom of commerce and the protection of the economic policy of the state. However, establishing such a balance is not easy since national courts in the country of enforcement have inclusive power to decide which kind of transactions may or may not be considered to affect the economic policy of the state.<sup>61</sup> The problem may arise since the differences between the economic public policy requirements of various states might lead to the risk that one state may set aside an award for reasons of public policy which other states would regard as unimpeachable. This is so because under the head of public policy, a court could refuse to enforce a foreign award on the ground that the award violates the national economic interests of the state. Also, a national court may refuse to enforce the award under Article V (2)(a) of the Convention on the ground that the subject matter of the dispute is not capable of being arbitrated. The arbitrability issue may create serious problems since countries may determine which matters may or may not be settled by arbitration in accordance with their own economic policy<sup>62</sup>; for example, by declaring that certain types of agreements are not capable of settlement by arbitration for being contrary to the public policy of the state, such as certain notions of anti-competition or antitrust disputes, intellectual property disputes, agreements to evade exchange control regulations and awarding punitive damages in arbitration.<sup>63</sup> Article I (3) of

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<sup>61</sup> This is the case under Article V (2)(b) of the New York Convention.

<sup>62</sup> Article V (2)(a) of the New York Convention does not provide a sufficient explanation of what kind of disputes could be considered non-arbitrable subject matters. Rather the Convention left determining the arbitrability of the subject matter to the national law of the country where enforcement will take place. Therefore, enforcement might be denied for considerations of national mandatory rules. See Bernard Hanotiau, *op. cit.*, 403.

<sup>63</sup> In *Laminoirs-Trefileries-Cableries de Lens SA v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980), a United States Federal District Court sitting in Georgia had refused to enforce a foreign arbitral award under the New York Convention on public policy grounds. The Georgia Court concluded that the arbitrators' decision that interest rates should rise by an additional five per cent constituted a penalty (which the court considered to be punitive damages) and therefore would not be enforced. See in general, Jhon Y Gotanda, "Awarding Punitive Damages in International Commercial Arbitrations in the Wake of *Mastrobuono v. Shearson Lahman Hutton, Inc.*," 38 *Harvard*



the New York Convention may also be of crucial importance here, since a state could declare, when it ratifies the New York Convention that it will apply the Convention only to differences arising out of commercial relationships. Thereby enabling the national courts of that state to freely construe this reservation under their national law.<sup>64</sup> This might create problems for the enforceability of foreign arbitral awards since the member states are under no obligation to define what they consider to be a commercial dispute when declaring the commercial reservation.<sup>65</sup> Accordingly, a claimant in an enforcement procedure cannot be sure whether the court in a country that made this reservation will declare a dispute non-commercial, and thus refuse to recognise and enforce the award. This may particularly be the case in certain kind of disputes that involve intellectual property rights and technology transfer issues.<sup>66</sup>

It is thus important to examine the limits of the discretionary powers of national courts in applying public policy as a ground to refuse the enforcement of foreign arbitral awards for

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*International Law Journal* (1997), p. 59; Hakan Berglin, "The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 4:2 *Dickinson Journal of International Law* (1986), p. 180; Christopher B. Kuner, *op. cit.*, p. 81; ILA Report, London Conference (2000), *op. cit.*, p. 21.

<sup>64</sup> Article I (3) of the New York Convention.

<sup>65</sup> Article V (2)(a) of the New York Convention left determining the arbitrability of the subject matter to the national law of the country where enforcement will take place, therefore, enforcement might be denied for considerations of national mandatory rules.

<sup>66</sup> Some countries do not consider intellectual property disputes to be of a commercial nature. In a decision made by the High Court of Bombay (*India Organic Chemicals Ltd v. Chemtex Fibres Inc.*, April 1977 (et al. India No. 4)), the court held that technology transfer was not a commercial transaction. Cited in Van den Berg, *op. cit.*, p. 53; P.D. Caramichael, "The Arbitration of Patent Disputes," 38 *Arbitration Journal* 3 (1983); See Mladen Singer, "International Commercial Arbitration and Intellectual Property and Technology Transfer Disputes," *Internet Address*, <http://themis.Wustl.edu/ibll/contract/ComArb.htm>; Mladen Singer, "Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes," 3 *Croat. Arbit. Yearb.* 1996, p. 107. However, one should consider that many countries recognise the commercial nature of intellectual property rights. For example, Article 2 of the Egyptian 1994 law provides that: "An arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, for example, the supply of goods or services, commercial agencies, construction and engineering or



considerations of protecting the national economic policy. The question of whether a national court should distinguish between national and foreign arbitral awards will be examined again under this heading. The question in this regard will be whether or not it is possible for a national court to disregard the national mandatory rules of its law and to apply instead notions that consider the special character of international commercial relationships. Therefore, determining the validity of a foreign arbitral award could be established upon drawing a distinction between situations that require the application of national public policy rules: that is when such rules aim to avoid a result which may be injurious to the very interests of the state's economic strategy; and situations that do not necessarily damage the supreme national economic interest of the state.

As will be established in the following examples, there are limits to the use of economic norms (as reasons of public policy nature) for determining the validity of foreign arbitral awards. Not every mandatory economic norm necessarily violates the fundamental economic interests of the state, particularly in relationships that involve international elements. It is also important to consider the scope of application of Article V (2)(a) of the New York convention, as national courts are required to give a wide interpretation to arbitrability in international commercial relations.

Since such problems could relate to various types of commercial activities, thus it would be difficult to explore all of the various situations within the limits of this chapter. Therefore it may suffice to examine the applicability of Article V (2)(a) and (b) in the field of intellectual property rights and a further examination will be made in relation to different types of trade restrictions.

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technical know-how contracts, the granting of industrial, touristic and other licenses, transfer of technology...”.

## B. Intellectual property rights

Intellectual property rights<sup>67</sup> are now regarded as one of the most valuable assets in the modern global market.<sup>68</sup> The importance of intellectual property rights to the economic strategy of the state or states in which such rights are protected has led national laws of various legal systems to consider the protection of such rights as part of their public policy.<sup>69</sup> This could be recognised since several legal systems require to determine the ownership and validity of intellectual property rights to be made only by a particular competent authority, for example, a registry office or a particular court.<sup>70</sup> Accordingly, various limitations have been imposed on the free will of the parties; for instance, some countries do not allow for a private body, such as an arbitral tribunal, to decide the validity and scope of intellectual property rights.<sup>71</sup> The latter restriction raises the problem of non-arbitrability, as national laws

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<sup>67</sup> It would be difficult within the limits of this topic to provide a coherent definition for intellectual property rights or all details that concern the classification of intellectual property rights. Also there are many details that concern the different legal status of intellectual property rights, such as, patents, trademarks and copyrights, as determining the arbitrability of such property rights may differ according to their type. For detailed information about these issues see, William Grantham, "The Arbitrability of International Intellectual Property Disputes," 14 *Berk. J. Int'l Law*, 1996, p. 172.

<sup>68</sup> This could be recognised since the economic success of a given state is now measured by how advanced its technology is and how sophisticated innovations that are used in its industry are. See Gary L. Benton and Richard J. Rogers, "The Arbitration of International Technology Disputes Under the English Arbitration Act 1996," *Internet address*, ([www.coudert.com/practice/arbtech.htm](http://www.coudert.com/practice/arbtech.htm)). The writers reported that the size of the world-wide information technology market has grown from US\$ 696,880 million in 1996 to \$1,056,052 million by 2000; In the United States, for example, the software industry grew at a rate of 12.5 per cent for 1990-1996, nearly 2.5 times faster than the overall US economy, making it the third largest manufacturing industry in the country.

<sup>69</sup> William Grantham, *op. cit.*, p. 173.

<sup>70</sup> In England and Wales, under the 1977 Patents Act this could be the Comptroller General of Patents; under the Trade Marks Act 46, 47 (1994) a court may revoke or invalidate a trademark; also see the Copyright, Designs and Patents Act of 1988.

<sup>71</sup> Marc Blessing, "Arbitrability of Intellectual Property Disputes," 12 *Arbitration International* No. 2 (1996), p. 191, at 198; Karl-Heinz Bockstiegel, *op. cit.*, pp 197 and 198. He refers to the Italian Supreme Court in 1978. (Corte di Cassazione 12 May 1977 in *Scherk v. Grandes Marques*, *Yearbook Commercial Arbitration* IV (1979) 289, which confirmed that a generally binding decision declaring such property rights null and void cannot be issued by arbitration, but only by the state authorities or

may reserve the determination on intellectual property rights for the exclusive jurisdiction of the national courts.<sup>72</sup>

The problem of arbitrability has a significant importance in international commercial relations particularly in the field of international licensing agreements<sup>73</sup> where very often parties include an arbitration clause under which they agree to resolve their disputes by means of international commercial arbitration.<sup>74</sup> This could also be the case if an international commercial transaction involves issues of intellectual property as part of the main contract, where the arbitral tribunal may be required to look into the validity and infringement of the intellectual property rights that are under question. Therefore, raising doubts about the arbitrability of intellectual property rights may create uncertainty to a wide range of international commercial relations, since parties and arbitrators cannot be sure whether the final award will be enforceable. For example, if an arbitral tribunal determines issues that concern the validity or infringement of such rights, then it may be possible that such a dispute would be declared non-arbitrable by the courts of the country where enforcement may take place, and therefore it may refuse to recognise and enforce the award.

It is important to recognise that various legal systems do not recognise the arbitrability of intellectual property issues at all. This means that parties to intellectual property disputes are

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courts; also see Van den Berg, *op. cit.*, p. 370; Roberto Ceccon, "Arbitration and Intellectual Property in the Italian Legal System," 13:1 *Journal of International Arbitration* (1996), p. 65.

<sup>72</sup> See, Karl-Heinz Bockstiegel, *op. cit.*, p. 197; Mladen Singer, "International Commercial Arbitration and Intellectual Property and Technology Transfer Disputes," *Internet Address*, <http://themis.Wustl.edu/ibll/contract/ComArb.htm>.

<sup>73</sup> Licensing agreements generally include that the intellectual property owner grants rights to use a trade secret, to manufacture or distribute copyrighted or patented products, or to utilise a trademark in the marketing of a product. Such agreement may also oblige a licensee to preserve the confidentiality and secrecy of the technology. Intellectual property disputes may arise in such agreements, for example, for allegations of improper use of the property right by the licensee. See, Gary L. Benton and Richard J. Rogers, *op. cit.*, p. 2.

<sup>74</sup> Parties to such international commercial agreements prefer to resolve their disputes by arbitration because they want to avoid the uncertainties of foreign laws and the risk of bias by foreign courts.

prohibited from resolving any dispute that relates to determining the validity, disposal and infringement of such rights by arbitration.<sup>75</sup> On the other hand, various legal systems limit this prohibition to issues that relate to determining the validity of intellectual property rights.<sup>76</sup>

However, there is a growing tendency towards recognising arbitration as a suitable means of resolving intellectual property disputes in international commercial relations. It is reported that, in 1991- 1992, a comparative study of the International Association for the Protection of Industrial Property (IAPIP/AIPPA)<sup>77</sup> focused on the arbitrability of intellectual property disputes between private parties according to national laws and statutes with regard to ownership, validity, scope, infringement and licences of intellectual property rights; according to the IAPIP summary, which was based on 24 national reports, “none of the reported national legislations forbid arbitration in respect of intellectual property rights from the outset”.<sup>78</sup>

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<sup>75</sup> It is reported that in many countries, “questions of the validity of intellectual property titles, even on an inter parties basis were excluded from arbitration by public policy.” Note prepared by the *International Bureau of WIPO*, p. 5. Cited in Mladen Singer, “Commercial Arbitration as a Means for Resolving Industrial Property and Transfer of Technology Disputes,” 3 *Croat. Arbit. Yearb.*, 1996, p. 15, footnote 24; also see Rene David, *op. cit.*, p. 188.

<sup>76</sup> Some legal systems limit the scope of the non-arbitrability to disputes that relate to determining the validity of intellectual property rights. See Mladen Singer, *op. cit.*, p. 15. The writer provides an example from the Croatian Law, and concluded that: “the relevant law explicitly forbids arbitration deciding upon the validity of industrial property rights. Article 11 of the Changes and Amendments of the Law on Protection of Inventions, Technical Improvements and Signs of Distinctions, which is in Croatia applied as a Law of the Republic, explicitly states that Croatian courts have exclusive jurisdiction to decide all disputes relating to validity of industrial property rights which were recognised by the State Patent Office or which are in force in the Republic of Croatia.”; also see, Marc Blessing, *op. cit.*, p. 201. He states that: “arbitrators are not entitled to declare a French patent invalid”; Under Articles 2059 and 2060 of the French Civil Code arbitrability is likely to be denied in disputes over the validity of registered intellectual property grants, see the decision of the Cour d’appel de Paris of 3 February 1992, published in PIBD 1992 III 359; Rene David, *op. cit.*, p. 188-89.

<sup>77</sup> See Web Site address: (<http://www.aippi.org>).

<sup>78</sup> See IAPIP Yearbook 1991/VI; the IAPIP Yearbook 1992; Cited in Marc Blessing, *op. cit.*, p. 200; also see, Julia A. Martin, “The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution,” 49 *Stan. L. Rev.* April, 1997, p. 917.

The situation has been fully determined in the United States and Switzerland, where arbitrability of intellectual property disputes has always been affirmed and recognised. In 1982 the American Congress added Section 294 to Title 35 of the United States Code<sup>79</sup>, which expressly provides that all disputes related to patents, including validity and infringement may be arbitrated.<sup>80</sup> In 1975, the Swiss Federal Office of Intellectual Property specifically accepted the enforcement of arbitral awards declaring the nullity of a patent and the cancellation of the corresponding patent entries in its Register.<sup>81</sup>

Increasingly, jurisdictions differentiate between disputes involving domestic relations, and those arising in the domain of international commercial relations. This distinction may lead national courts to recognise and enforce foreign arbitral awards even where a dispute raises the validity and/or ownership of intellectual property rights. Accordingly, the fact that

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<sup>79</sup> 35 U.S.C. S. 294 (1984) and 35 U.S.C. S. 135 (d) (1984); In California for example, Section 1297.16(p)-(q) of the Cal. Code Civ. Proc., provides wide protection for the integrity of international arbitration, including disputes arising from data or technology transfer and intellectual or industrial property, trademarks, patents, copyrights and software programs; see, Michael F. Hoellering, "New Opportunities for Patent Arbitration," *N.Y.L.J.* Dec. 16, 1982, p.1; also see *Fritz Scherk v. Alberto-Culver Co.* June 17, 1974 (U.S. no.4), in which the court distinguished between domestic relations and disputes which involve international relations. Cited in Van den Berg, *op. cit.*, p. 362; also see, Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 143, (fn 65).

<sup>80</sup> Also, in trademark disputes, a federal court held that the absence of an explicit statutory support for the arbitrability of trademark disputes does not indicate that the Congress' intent to preclude arbitration of trademarks claims. (*Alexander Binzel Co. v. Nu-Teeys Co.*, No. 91 C. 209z, 1992 WL 26932 (ND III. 1992)). Similarly, in the copyright area, the Seventh Circuit in *Saturday EvPost Evening Co. v. Rumbleseat Press. Inc.* 816 F 2d 1191 (7<sup>th</sup> Cir. 1987). The Court held that federal law does not forbid arbitration on the validity of copyright at least where that validity becomes an issue in the arbitration of a contract dispute; *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228 (2d Cir. 1982). The court held that: "the court had jurisdiction to order arbitration, and that public policy does not prohibit the submission of copyright infringement claims to arbitration"; See Joseph T. McLaughlin, "Arbitrability: Current Trends in the United States," 12 *Arbitration International* 2 (1996), p.135; Mladen Singer, *op. cit.*, p. 23.

<sup>81</sup> Decision of 15 December 1975. See Swiss R. Indus. Prop. & Copyright 36-38 (1976); Published in Schweizerische Mitteilungen uber Gewerblichen Rechtsschutz und Urheberrecht; also see, the information of the Swiss Patent and Trademark Office of 15 December 1975, published in the Swiss Patent, Design and Trade Marks Gazette (1976), p. 9; See Marc Blessing, *op. cit.*, p. 200; The Swiss Federal Private International Law Statute of 1987, Article 177.1; also see, Robert Briner, "The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in



intellectual property matters are very closely linked to public policy interests should not lead to undermine the importance of arbitration as a suitable means of resolving intellectual property disputes. One could point out several reasons for acknowledging foreign arbitral awards that involve intellectual property issues.

Firstly, national courts should recognise the nature of such disputes in that intellectual property disputes require quick resolution which is more efficient, less complicated, and less expensive than litigation.<sup>82</sup> Recognising the growing need for this type of intervention, the World Intellectual Property Organisation (WIPO)<sup>83</sup> established an Arbitration and Mediation Centre which among other things, specialises in resolving intellectual property disputes.<sup>84</sup>

Also, it is important to select arbitrators that have the knowledge and/or technical experience necessary for resolving complicated and High-Tec disputes which may improve the quality of decision-making in such cases.<sup>85</sup> Moreover, intellectual property disputes may involve sensitive issues such as, financial data, new product information, and marketing strategies,

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Switzerland," *Arpad Bogsch, Preface*, in *Worldwide Forum on the Arbitration of Intellectual Property Disputes*, WIPO ed., 1994, at 55, 56-66.

<sup>82</sup> For example, the WIPO Arbitration Centre offers arbitral proceedings in accordance with Expedite Arbitration Rules, should make the arbitration even less expensive and faster. See Section III Article 14 which concerns the composition of the arbitral tribunal, Section IV Article 53 (b) which provides that oral hearings (if held) cannot exceed three days, except in exceptional circumstances.

<sup>83</sup> WIPO is an intergovernmental organisation with 155 member states. See, *World Intellectual Property Organisation (WIPO) Doc. 445(E) (1995)*.

<sup>84</sup> In 1994 the WIPO founded the Arbitration and Mediation Center, based in Geneva - Switzerland, the Centre offers arbitration and mediation services for the resolution of international commercial disputes between private parties. Also, for this particular purpose, WIPO has enacted arbitration rules that are drafted according to the model of UNCITRAL Rules.

<sup>85</sup> It is important that intellectual property disputes, which often involve complicated technical issues, are resolved by arbitrators who are knowledgeable of both the respective intellectual property laws and transfer technology. This is particularly important since judges of national courts are usually very knowledgeable about the intellectual property laws of their respective countries, but the technical questions in a dispute could be beyond their knowledge, whereas an arbitration tribunal which may consist of arbitrators from different legal backgrounds, could provide the parties with a diversity of knowledge and an understanding of different legal and cultural traditions. See, Najar, "The Inside View: Companies in Need of Arbitration," 12 *Arbitration International* 3 (1996), at p. 364.



therefore resolving such disputes requires a certain confidentiality that could only be obtained by resorting to arbitration as opposed to the publicity of litigation.<sup>86</sup>

Secondly, one should recognise that prohibiting arbitrators from determining the validity of certain intellectual property issues should not include all disputes in this field. There are certain intellectual property issues that could exist independently of any registration proceedings. Therefore, a distinction should be made between intellectual property - such as patents and trademarks - whose grant is noted in public registers, and those other types of intellectual property which are not registered, either because they exist at the moment of creation, as with copyright or because they could be protected as confidential know-how.<sup>87</sup>

Finally, a national court in the country of enforcement must distinguish between national and international public policy, since using the national public policy of the state of enforcement as a barrier to arbitration in international disputes might lead to unacceptable results, particularly if the dispute had been held to be arbitrable under the law which the arbitral tribunal deemed applicable and/or according to the law of the seat of arbitration.<sup>88</sup> Such a critical situation may occur if the court deemed the dispute non-arbitrable because of domestic public policy, notwithstanding that the dispute had been held to be arbitrable on the

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<sup>86</sup> It is important in intellectual property disputes that hearings and procedures be closed in order to protect the confidentiality of evidence and awards. Therefore, arbitral awards that involve technology information are usually not published, however, even if they are published, they usually do not contain the names of the parties or other elements that may disclose their identity. The importance of confidentiality in intellectual property and technology transfer disputes is considered in the WIPO Arbitration Rules, which contain an entire section dedicated to confidentiality. Section VII, Articles 73–76 of the WIPO Arbitration Rules; Section IV Article 52 of the WIPO Arbitration Rules; See Paulsson and Rawding, “The Trouble with Confidentiality” (1995) 11 *Arbitration International*, p. 303; Neill, “Confidentiality in Arbitration” 12 *Arbitration International* 3 (1996), at p. 287; Charles S. Baldwin, “Protecting Confidential and Proprietary Commercial Information in International Arbitration,” 31 *Tex. Int’l L.J.* (1996), p. 451.

<sup>87</sup> Julia A. Martin, *op. cit.*, p. 91; Rene David, *op. cit.*, p. 188.

<sup>88</sup> Marc Blessing, *op. cit.*, p. 195.

basis of a law that is closely connected to the dispute, and which may also correspond to the parties' legitimate expectations.<sup>89</sup>

The application of a foreign arbitral award may be refused, in my view, if and when the award amounts to a violation of national fundamental interests that are so important that they need to be protected by public policy or by the limits imposed on the basis of public policy in international affairs. However, if the subject matter of the award concerns intellectual property matters, for example, if the award determines questions that concern the validity of a patent or a trademark, then it would be advisable to ascertain first whether the particular issue is arbitrable in the country where enforcement might take place.<sup>90</sup>

### C. Trade Restrictions

There is a specific public interest in prohibiting certain contractual practices that could damage the economic policy of the state, for example, agreements which violate the exchange control laws or which provide for the payment of obligations in gold.<sup>91</sup> The rationale behind prohibiting such agreements rests on the assumption that the interest at stake is so strongly driven by economic policy, since such restrictions aim to prevent the

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<sup>89</sup> See Yves Derains, *op. cit.*, p. 234.

<sup>90</sup> This could be made during the arbitration proceedings, as the tribunal could stay the proceedings until the court of law in the country where the particular intellectual property right was granted decides the issue and, after that, to continue with the arbitration. See, Roberto Ceccon, *op. cit.*, p.75. He states that: "if during arbitration proceedings, questions arise which, pursuant to law, cannot be decided by arbitration, (i.e. matters regarding the validity of patent or violation of copyright, etc.) .. arbitrators must suspend the proceedings (under Article 819 Of the Italian Code of Civil Procedure (CPC)) until the day when one of the parties notifies the arbitrators of the final and binding award."

<sup>91</sup> For example, it is reported that payments of obligations in gold is prohibited in Egypt by a decree of 1935, which prohibit payments in gold in national and international transactions as this violates public policy in Egypt. See Muhammad Kamal Fahmy, *The Essence of Private International Law*, 2ed (1985) (no publisher), p. 512; See Ashraf al Rifaie, *op. cit.*, p.12.

depreciation of the national currency of the state.<sup>92</sup> However, for practical necessity, many countries have accepted to enforcing such clauses as long as they relate to international commercial agreements.<sup>93</sup>

This was the view of the United States' courts in *Konkar Indomitable Corp. v. Fritzen Schiffsagentur and Bereederungs-GmbH*.<sup>94</sup> The court found that the "gold clause", a federal statutory economic provision which explicitly stated that as a matter of public policy, it could not form as the basis for a successful public policy challenge to a foreign arbitral award, since enforcing such clauses does not "involve the United States' most basic notions of morality and justice." Moreover, the court established that the policy of encouraging international arbitration must prevail over domestic economic concerns.<sup>95</sup>

A similar example is a decision of the French Court of Cassation in "*Messageries Maritimes*".<sup>96</sup> Whilst the award was contrary to Canadian law, which forbids gold clauses without distinguishing between internal and international payments<sup>97</sup>, the French Court of Cassation examined the validity of the agreement under the French law of 25 June 1928,

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<sup>92</sup> Dennis Lloyd, *op. cit.*, p 12.

<sup>93</sup> *Ibid.*, p. 12. The writer states that the English law recognises the validity of gold clauses in international contracts; also see, *Feist v. Sco. Belge d'Electricite* [1934] A.C. 161; *King v. International Trustee etc.* [1937] A.C. 500.

<sup>94</sup> *Konkar Indomitable Corp. v. Fritzen Schiffsagentur and Bereederungs-GmbH*, No. 80 Civ. 3230 (S.D.N.Y., 1 May 1981); Cited by, Christopher B. Kuner, *op. cit.*, p. 77.

<sup>95</sup> Also see the Swiss Federal Supreme Court decision in *Inter Maritime Management SA -v- Russin & Iecchi*, 9 January 1995, reprinted in (1997) XXII *Yearbook* 789. The court decided that the substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of its national law; ILA *Report*, London Conference (2000), *op. cit.*, p.18.

<sup>96</sup> *Messageries Maritimes*, decided on 21 June 1950, R. 1950. 609. Cited by Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 274.

<sup>97</sup> The Gold Clauses Act of 1937 of Canada. Article 6 provides that: "Every gold clause obligation is hereby declared to be contrary to public policy and no such provision shall hereafter be contained in, or made in respect of, any obligation". Article 2 illustrates the meaning of a gold clause: "The expression ' ' in this Act means any obligation heretofore or hereafter incurred (including any such obligation which has, at the date of the commencement of this Act, matured) which purports to give to the creditor a right to require payment in gold or in gold coin or in an amount of money measured thereby, and includes any such obligation of the Government of Canada or of any province."

which considers gold clauses valid. The court declared that parties are entitled to agree for the payments of their obligations in gold, even if this may contradict the mandatory rules of a municipal law governing their contract.<sup>98</sup>

In the latter example, the court examined the enforceability of a foreign arbitral award according to its validity under foreign mandatory rules and the decision may indicate that the test in determining the validity of a foreign arbitral award should be based upon its compliance with the national mandatory rules of the state of enforcement. In other words, if the award does not violate the national economic interests of the state, and there was no substantial connection between the subject matter of the dispute and the country of enforcement, then there should be no rational basis to refuse the enforcement of the arbitral award. However, relying on this test alone could be problematical. For example, this may damage the commercial relationships between the country of enforcement and the country whose national economy is at stake.

Therefore, it is important to consider that there are several reasons that may drive a national court to apply, or at least to take into consideration, the economic mandatory rules of a foreign state. For example, in a case involving the comity of states, where a court may consider the importance of applying foreign mandatory rules in cases involving a foreign element, because not to do so would constitute a disregard of the interest (whether economic or other) of another state.<sup>99</sup> This was the view in *Soleimany v. Soleimany*<sup>100</sup>, the parties acknowledged that the goods (Persian carpets) were to be imported into a foreign country,

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<sup>98</sup> See Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 274 54 . He regards this decision instrumental in creating a rule of "substantive private international law specific to international payments and different from the rule of French law applicable to domestic payments. This new rule was that of the validity of gold clauses in international contracts"; also see, *New Brunswick RY. CO. v. British and French Trust Corporation. (H.L.(E.))* 1939, A.C. P 16.

<sup>99</sup> J. G. Collier, *op. cit.*, p. 379.

<sup>100</sup> *Soleimany v. Soleimany*, Court of Appeal, February 19, 1998. Reported in [1998] 3 W.L.R. 811; [1998] C.L.C. 779.

contrary to the revenue law and export controls of Iran. The Court of Appeal considered the violation of a foreign law as a violation of public policy in England. It held that:

“... where a foreign arbitration award was made pursuant to a valid arbitration agreement, but was based on a contract which was illegal under the law of a friendly foreign state, where that law governed the contract or the contract was to be performed in that state, the English court would not enforce that award on the grounds of public policy.”<sup>101</sup>

The *Soleimany* case shows that enforcement of a foreign arbitral award can be refused if it violates the economic public policy rules of the state that has a close connection to the subject matter of the dispute.<sup>102</sup> However, such a connection may not in itself constitute a sufficient reason to refuse the enforcement of a foreign arbitral award. It is important to examine, whether or not the links are such that the public interest of that country is capable of being affected by the enforcement of the award.<sup>103</sup>

The question that arises here is thus, what is the connection between the public policy in the country of enforcement and the mandatory rules that are designed to protect the economic policy of a foreign state?

Generally, there are several factors which may drive a national court to consider the mandatory rules of a foreign state. For example, great damage might be done to the economy of a foreign state, particularly if the parties intended to circumvent the mandatory rules of that state by choice of a foreign law or forum. Justice and comity of nations require to apply the

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<sup>101</sup> See also, *Foster v. Driscoll*.(1929) 1 K. B. p. 522, in which Sankey L.J. held that: “To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally.”

<sup>102</sup> In determining the connection between the subject matter of the dispute and a given State, it might be necessary to take account of the law governing the arbitration agreement. This could be established, for example, if that law is considered to be the law which should govern the subject matter of the dispute in the absence of a choice of law by the parties.

<sup>103</sup> A.J.E Jaffy, *op. cit.*, p. 16.



mandatory rules which are designed to protect the interest of that state, which in certain circumstances deserve to prevail over the parties' interests.<sup>104</sup> Also, this could be based upon the notion of reciprocity, in the sense of "do as you would done by".<sup>105</sup> It is in the interest of the country of enforcement to consider the economic policy of other states, otherwise it will risk the possibility of being treated in the same manner.<sup>106</sup> Moreover, this could be justified if there are mutual economic interests between the state of enforcement and the state whose public interests are most likely to be affected by enforcing the arbitral award. This is particularly the case if the two countries are parties to an international commercial treaty.<sup>107</sup> For example, an award may not be enforced by the English courts if it has the effect of enforcing an unlawful agreement violating the mandatory competition rules of the EC Treaty<sup>108</sup>, for instance, agreements that restrict free competition between the member states.<sup>109</sup> This is the case under Article 81 of the EC competition rules (formerly Article 85 of

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<sup>104</sup> *Ibid.*, pp. 7 and 15; also see, *Ralli Brothers v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287.

<sup>105</sup> J. G. Collier, *op. cit.*, p. 379.

<sup>106</sup> Richard A. Cole, *op. cit.*, p. 380. The writer states that the fear of retaliation for non-enforcement is one of the reasons which made the court in *Parsons & Whittemore Overseas Co* construe the public policy defence so narrowly (the most basic notions of morality and justice). See, *Parsons and Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 at p. 975.

<sup>107</sup> Pierre Lalive, "Transnational (or Truly International) Public Policy...", *op. cit.*, p. 268; Andrej Bolfek, "Application of European Community Competition Law in Arbitration Proceedings from the Aspect of Public Policy," 7 *Croat. Arbit. Yearb.* (2000), p. 141; Christoph Liebscher, "Arbitral & Judicial Decision: European Public policy After ECO SWISS," 10 *Am. Rev. Int'l Arb.* (1999), p. 73-78.

<sup>108</sup> *BRT v. SABMA* ( Case 127/73 [1974] ECR 51; also see, *ILA Report*, London Conference (2000), *op. cit.*, p. 20. The report states that: "In 1998, the Austrian Supreme Court reached a similar conclusion on the status of European Community Law. It held that any provision of European Community Law, which is directly applicable in the Member States, is - according to its supremacy - automatically part of Austrian national public policy. Therefore, in its opinion, an arbitral award which was in conflict with any directly applicable community law could be quashed." The decision concerns Articles 81 and 82 EC (ex Arts. 85 and 86). 3 Ob. 115/95, dated 23 February 1998, reported in (1999) *Review. Arbitration*, p. 385.

<sup>109</sup> The Competition Law is designed to control and regulate the freedom of trade between the Member States, it is therefore based on public policy considerations that could constitute an effective ground to refuse the enforcement of an arbitral award under Article V (2)(b) of the New York Convention. In *Eco Swiss China Time Ltd. v. Benetton International NV*, Court of Justice of the



the Treaty of Rome 1957)<sup>110</sup> and Article 82 (formerly Article 86).<sup>111</sup> Article 81 prohibits anti-competitive agreements which may have a considerable effect on trade between member states and which prevent, restrict or distort competition within the common market.<sup>112</sup> Such agreements or decisions are declared to be “automatically void under Article 81 (2), subject either to express exemption being given under Article 81 (3) or to falling within one of the block exemptions issued by the Commission”<sup>113</sup>, in which case exemption is automatic. Only the EC Commission is competent to grant such exemptions.<sup>114</sup> It follows that arbitrators under Article 81 (3) are precluded from exercising any jurisdiction in deciding, for example, that an exemption would be justified pursuant to Article 81 (3).<sup>115</sup>

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European Union, I June 1999, C-126/97, ECR I-3055, [1999]; [1999] 2 All ER (Comm) 44; reprinted in 14(6) *Int'l Arb. Rep.*, B-1 (June 1999); 1999 Rev. Arb. 631. The European Court of Justice found that the provisions of Article 85 (Article 81 of the Amsterdam Treaty) constituted fundamental provisions essential for the accomplishment of tasks entrusted to the Community and for the functioning of the internal market. Accordingly, they were to be regarded as a matter of public policy within the meaning of the New York Convention; See, Andrej Bolfek, *op. cit.*, p.141; also see, ILA *Report*, London Conference (2000), *op. cit.*, p.19. The report states that: “The European Court of Justice has elevated this rule to the level of international public policy (at least within Member States).”

<sup>110</sup> The Treaty of Rome was amended by the Treaty of Amsterdam, dated 2 October 1997.

<sup>111</sup> Article 82 prohibits the abuse of a dominant position insofar as it may affect trade between member states.

<sup>112</sup> Julian DM Lew, “Determination of Arbitrators’ Jurisdiction...,” *op. cit.*, p. 79.

<sup>113</sup> The Commission can grant individual or group exemptions from this prohibition if there are overriding countervailing benefits such as an improvement in efficiency or the promotion of research and development.

<sup>114</sup> See Regulation 17. To facilitate the granting of exemptions under Article 85 (3), the EC Commission has issued several block exemptions, for example, see Regulation No. 1983/83, which concerns Categories of Exclusive Distribution Agreements; Regulation No. 184/ 83, which concerns Categories of Exclusive Purchase Agreements. See Julian DM Lew, ‘Determination of Arbitrators’ Jurisdiction ...,’ *op. cit.*, p. 79; John Beechey, “Arbitrability of Anti-trust/Competition Law Issues-Common Law,” 12 *Arbitration International* No. 2 (1996), p. 197 at 180.

<sup>115</sup> However, an arbitrator is not precluded from deciding that a contract does not violate Article 81, but if he recognises that the contract violates Article 81, then he cannot refer the matter to the EC Commission for exemption under Article 81 (3). See, Karl-Heinz Bockstiegel, *op. cit.*, p. 192; Julian DM Lew, “Determination of Arbitrators’ Jurisdiction,” *op. cit.*, p. 81; also see, *Gemeente Almelo v. Energiebedrijf Ijsselmij NV* (Case No 393/92) (1995)XX ICCA *Yearbook Cmm. Arb.*, p. 187; [1994] I ECR 1477. (a decision of the European Court of justice on a reference from the Netherlands; V. V. Veeder, “English Arbitration Act of 1996, *op. cit.*, p. 66.

Further restrictions on the powers of arbitrators under the EC Treaty are imposed by Article 234 of the EC competition rules (formerly Article 177 of the Treaty of Rome), which allows for reference to be made to the European Court of Justice for ruling on questions of interpretation of the Treaty by any court or tribunal of a Member State.<sup>116</sup> Arbitrators are not considered to be a court or tribunal for the purpose of such a reference; thus a reference cannot be made directly by an arbitrator.<sup>117</sup>

The relevant interests referred to in Articles 81 and 234 of the EC competition rules are designed to protect communal interests between the EC member states, which compel the member states to respect such community rules in the field of the common commercial policy.

However, most national laws now permit disputes involving competition law and antitrust matters to be arbitrated.<sup>118</sup> This trend is the clearest in the United States. In the famous *Mitsubishi* case<sup>119</sup> the United Supreme Court distinguished between domestic public policy and the narrower concept of international public policy, the court declared that there are no

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<sup>116</sup> *Bulk Oil (Zug) AG v. Sun International Ltd* [1983] 2 Lloyd's Rep 587; [1984] 1 W.L.R. 147 (C.A.); 2 C.M.L.R. 91 (High Court).

<sup>117</sup> See, European Court of Justice, Case No. 102/81, March 23, 1982; *Nordsee Deutsche Hochseefischerei Nordstern GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co*, and *Friedrich Busse Hochseefischerei Nordstern AG & Co* [1982] E.C.R 1095. The ECJ noted that parties are not free to create exceptions to EEC law, which must be observed in its entirety throughout the Member States with compliance to be ensured by arbitral tribunals under supervision by the ordinary courts. See, Andrej Bolfek, *op. cit.*, p. 141; *Eco Swiss China Time Ltd. v. Benetton International NV*, 14(6) Int'l Arb. Rep., B-1 (June 1999); 1999 Rev. Arb. 631; Christoph Liebscher, *op. cit.*, p. 81; John Beechey, *op. cit.*, 181; Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 141. Fn 55.

<sup>118</sup> Russell on the Law of Arbitration accept arbitrability, but finds it necessary to inform the Commission. Russell on the Law of Arbitration (19<sup>th</sup> ed 1979), *op. cit.*, p. 417; also see Redfern and Hunter, 2<sup>nd</sup> ed., *op. cit.*, p. 142.

<sup>119</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985). Also reported in, *International Commercial Arbitration, Cases, Materials and Notes on the Resolution of International Business Disputes*, (1997) The Foundation Press, INC, p. 313; Prior to the *Mitsubishi* case, the general rule was that antitrust disputes were not subject to arbitration. See the Second Circuit decision in *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F2d 821, 827-28 (2d Cir. 1968).

public policy reasons prohibiting the arbitration of antitrust disputes in the context of international agreements.<sup>120</sup>

It seems that the field of arbitrable matters is expanding markedly, and countries are racing to allow arbitration in nearly all matters. Courts of many countries have concluded that not all of their respective prohibitive or proscriptive laws are relevant when considering whether or not to enforce a foreign award. Both judicial and arbitral practice revealed that the intervention of public policy should be based upon an analysis of the interests served and a rational observation of the requirements of international commercial relations.<sup>121</sup> This is both logical and inevitable, as economic interest drives the state in order to compete in the international market and to encourage trade in their territories. Courts are therefore called upon to strike a balance between the interests of promoting international investments and the public's interest in protecting the national economic policy. Also, courts have to be aware of the effects of their decision, since determining the validity of a foreign arbitral award according to national economic mandatory rules might lead to adverse effects, especially since national courts' decisions that involve international commercial arbitration are carefully monitored by the international arbitration community.<sup>122</sup> A decision that does not recognise the development of international commercial relations and the requirements of the

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<sup>120</sup> The court relied on the Supreme Court's decision in *Scherk v. Alberto-Culver Co.* (417 US 506). The question in *Scherk* was whether to allow the arbitration of a securities issue in an international contract despite federal statutes prohibiting the waiver of a right to trial in a securities case. The Court recognised the importance of arbitration clauses to achieve certainty in international transactions. See Hakan Berglin, *op. cit.*, p. 172; See, Lawrence W. Newman & Michael Burrows, "Arbitration of Antitrust Disputes," *New York Journal* (may 1998); Joseph T. McLaughlin, *op. cit.*, p.133; John Beechey, *op. cit.*, p. 183.

<sup>121</sup> In *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1979). The court stated that: "International commerce has grown too large and the world too small for American courts to disregard the law of nations, even in favor of the Bankruptcy Act". Cited in Hakan Berglin, *op. cit.*, p. 170; also in *Bremen v. Zapata Offshore Co.*, The U.S. Supreme Court evidenced its attitude that: "We cannot have trade and commerce in world markets and international waters exclusively on our terms." *Bremen v. Zapata Offshore Co.* 407 U.S. 1 (1972) at 9; Richard A. Cole, *op. cit.*, p. 376.

international community of merchants might thus jeopardise the reputation of the state of enforcement as a suitable business forum. A bad reputation therefore could be costly to the economic interest of the state.

Moreover, courts must not ignore the fact that social or economic conditions may change and make a commercial practice expedient which formerly was considered to run counter to the rules of commerce. As has been mentioned in chapter two<sup>123</sup>, the notion of public policy is not immutable. It may change from place to place and from time to time. Therefore, contracts which at one time were deemed to be contrary to public policy, could at another time be considered to be consistent with public policy, and for the public benefit.<sup>124</sup> Courts cannot remain permanently oblivious of such changes, therefore they must recognise that public policy and public morals which are designed to protect the national economic policy in a purely domestic context need not always have the same effect in the external sphere. Therefore, there should be difference of intensity in the application of the notion of public policy to international commercial relations, for example, by recognising that such relations require the application of principles which accord with modern needs, such as, the *lex mercatoria*, the usages of international trade and the general principles which are generally recognised by the international community of merchants.

However, the situation has to be considered as essentially different when the mandatory domestic rule reflects a fundamental legal value, the protection of which is necessary in safeguarding certain core community objectives, where in such situations the

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<sup>122</sup> See Klaus Peter Berger, *op. cit.*, p. 653.

<sup>123</sup> See, Chapter Two, at p. 69.

<sup>124</sup> Karl-Heinz Bockstiegel, "Public Policy and Arbitrability," *op. cit.*, p. 180. He states that: "national public policies have changed over the years, influenced by a number of factors such as national developments in the political and legal system the involvement of the national economy in international trade, political decisions such as the promotion of foreign investment, or international developments."

public policy defence should prevail. Therefore, to invoke public policy an award must at least violate the stringent and most imperative economic interests that would effect the economic status of the country of enforcement.<sup>125</sup>

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<sup>125</sup> This could be achieved if courts adopt the *Parsons & Whittemore Overseas Co.* guideline of the “most basic notions of morality and justice.” See, *Parsons and Whittemore Overseas Co. Inc. v. Societe Generale de l’Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 at p. 975.

## **CHAPTER SEVEN**

### **SUMMARY AND CONCLUSIONS**



## **Chapter Seven**

### **Summary and Conclusions**

There is no doubt that public policy could affect the enforcement of foreign arbitral awards. The lack of a clear and comprehensive definition for public policy leaves the door wide open for domestic courts to determine the extent of those matters that are deemed contrary to public policy, according to their notion of the concept. This is particularly the case under Article V (2)(b) of the New York Convention, which does not clarify this ground nor offer guidelines for national courts to determine whether or not there is a distinctive policy to refuse the enforcement of a foreign arbitral award. Giving national courts such discretionary power in determining the scope and ambit of public policy has led to a variety of interpretations of this notion, which may expose the award to additional conditions other than the limited grounds provided under Article V (1) of the New York Convention. Accordingly, whether, or to what extent, this ground must be taken into account in determining the validity of foreign arbitral awards will ultimately depend upon the considerable powers conceded to the courts in defining a precise limit of public policy.

The prime objective of this study was to argue that there is room for discussion about the degree of control a state should exercise. There is also room for argument as to whether a distinction should be drawn between international and domestic arbitration, the former being less strictly controlled than the latter. The general trend in arbitral and court awards is to construe the New York Convention's public policy defence narrowly by restricting the application of domestic public policy to a minimum while at the same time the application of public policy rules and moralities of the international community must be considered. The discussion has drawn its inspiration from the growing international awareness of the notion of

international public policy, which has developed according to the demands of international commercial relations.

To illustrate the effect of public policy on the enforcement of foreign arbitral awards, it was necessary to examine the application of this notion throughout the successive stages of the arbitration process. This was done by considering the possible application of this concept during the arbitration process by the arbitral tribunal then, by the courts in the country of origin and finally before the courts in the country in which enforcement is sought under Article V (2)(b) of the New York Convention.

At the first stage, it was important to examine the potential conflict of public policy rules during the arbitration process. The questions that were dealt with at this stage were, whether or not arbitral tribunals have a duty to consider the application of public policy rules during the arbitration process and how an arbitrator can determine the applicable public policy rules in the domain of international commercial arbitration. As stated in chapter three, arbitrators are obliged to respect the 'parties' autonomy' and the rules which they have chosen to govern their dispute. However, the efficacy of this concept is subject to public policy limitations. It has been argued that arbitrators could disregard the parties' choice of law if the underlying motives of their choice aimed at violating the public policy rules of countries that have a close connection to the dispute. This may be the case if the parties deliberately attempted to exclude parts or all of the mandatory rules of a particular national law, for example, the law which is duly applicable according to the conflict of law rules. Therefore, in spite of the arbitrators' obligation to apply the law chosen by the parties, arbitrators are not completely barred from applying other rules to the dispute, particularly if by disregarding the parties choice arbitrators would avoid derogation of the public policy of

other countries connected to the dispute. This is due to the arbitrators' duty to make every effort possible to provide the parties with an award that is more likely to be recognised and enforced.<sup>1</sup> Moreover, arbitrators have a responsibility to the process of arbitration itself. For commercial arbitration to be effective there must be full confidence in the integrity of the process. Therefore, arbitrators should take account of the interests of the community or communities that would be affected by the resulting award. This may include taking into consideration the public policy rules of the place where arbitration proceedings are conducted, the place or places where enforcement may take place, the public policy of the law chosen by the parties and the public policy of the place where performance of the contract will take place. However, the diversity of legal systems that could have connection to the dispute might make the determination of the applicable public policy rules a matter of guesswork. The difficulty particularly arises since arbitrators have no allegiance to a specific state, and therefore they do not have conflict of rules of their own. Moreover, they are not expected to "scientifically investigate" the public policy rules of different legal systems and they may not have the time nor the knowledge to do so.

The conclusion drawn at this stage is that arbitrators are not expected to comply with national standards of public policy, especially where the national rules in question were designed to govern domestic relations only. Therefore, arbitrators must search for the proper public policy rules according to what they may consider to be closely connected to the dispute. They also have to ascertain the public policy rules that a national law considers essential to the protection of its national interests and moral values, those which are applicable to both national and international commercial relations. Finally, to avoid any potential conflict in

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<sup>1</sup> If an arbitrator made a decision without considering the applicable public policy rules, he would be infringing the duty he is expected to respect and abide by. As mentioned above, this approach corresponds to the modern tendency followed in international commercial arbitration, where arbitrators are obliged to ensure the validity of their award. See, Article 32 (2) of the LCIA Rules; Article 35 of the ICC rules of (1998); Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," 18:2 *Journal of International Arbitration* (2001), p. 135.

deciding public policy issues, it has been suggested that arbitrators should consider the application of internationally accepted public policy rules as the most appropriate public policy rules to govern international commercial relations, which they must protect and guarantee.

At the second stage, it was important to examine the effect of setting aside an arbitral award for considerations of public policy in the country of origin. This relates to the fact that setting the award aside in the country of origin is one of the grounds for refusing enforcement in foreign countries under Article V (1)(e) of the New York Convention. It has been established that invoking the public policy ground to set an arbitral award aside should be based upon considering the connection between the arbitral award and the country of origin.

In this regard it is important to keep in mind that enforcement of an award may take place in a country that may have no connection with the subject matter of the dispute. Courts are therefore required to consider the distinction between national and international arbitral awards. If the award has no connection to that country other than that it was chosen for convenience as a neutral forum then, there will be no rational reason for the court of origin to set the award aside because it violates purely national public policy rules. This may particularly be the case if invoking national public policy standards would create a conflict with the mandatory rules of the law which are closely connected to the dispute. Also, it has been mentioned that the court of origin may not be able to determine the validity of an arbitral award according to its compliance with foreign mandatory rules, since a court in the country of origin cannot understand the subtleties of application and the exact extent of a public policy rule deriving from a foreign legal system. Moreover, a court in the country of origin cannot decide what a particular foreign rule is designed to prevent or how an international arbitral award would be treated under the legal system of that country.

It has been concluded that applying the concept of international public policy provides a reasonable solution for the conflict of public policy rules, and it is advisable in such cases that a court of the country of origin leave the determination of the exact extent of public policy to the courts of enforcement. This alleviates the problem of a court of the country of origin attempting to apply the public policy of a foreign legal system with which it is not familiar. Also, applying internationally accepted public policy rules might increase the chances of enforcing the award, which might ultimately preserve the integrity of the court's decisions when the award has been brought before the courts of another jurisdiction as a foreign arbitral award. To this end, it has been argued that whilst Article V (1)(e) of the New York Convention provides grounds for refusing recognition and enforcement of an award if it has been "set aside or suspended by a competent authority of the country in which or under the law of which, that award was made", a successful challenge that was based upon purely national public policy rules in the country of origin may not deprive the award of its binding effect in other countries. By reference to the phrase "recognition and enforcement may be refused" provided in Article V (1), it was possible to conclude that the grounds included in Article V (1) are discretionary and not mandatory. Therefore, the courts in the country of enforcement are not compelled to refuse the enforcement if the award was set aside by a court in the country of origin on the basis of purely national public policy rules, this may arise in exceptional cases, where the nullification order by the court of origin does not constitute a violation of public policy in the country in which enforcement takes place. For example, when the court of enforcement finds that the nullification order was based on unreasonable grounds or that the court of origin had set the award aside due to the formal requirements of its national procedural law, such as where an arbitrator refused to sign the arbitral award, where this was not required by the applicable procedural law or by the public policy rules of the country of enforcement.

The final stage concerns examining the application of public policy in the country of enforcement. At this stage, several examples were examined in order to illustrate the extent to which public policy is applied as a ground on which to refuse the enforcement of foreign arbitral awards. Since public policy covers a wide range of issues, it was necessary to categorise these issues into two main areas; procedural public policy issues and those which relate to the subject matter of the dispute.

A foreign arbitral award may be examined by the court enforcing it for procedural irregularities in order to ensure whether or not arbitrators have considered the fundamental values of justice and fairness in making the award, and whether or not parties have had a fair opportunity to present their case. Attention has been drawn to the difference between the role of Article V (1)(b) and the public policy ground under Article V (2)(b) of the New York Convention. Whilst Article V (1)(b) provides grounds for refusing the enforcement of an arbitral award for procedural irregularities, the public policy ground could still be invoked as an additional control in order to remedy the procedural irregularities which are not covered by Article V (1) of the Convention.

Several reasons could be drawn to justify this view. Firstly, Article V (1)(b) provides that recognition and enforcement of the award may be refused if “the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” The phrase “or was otherwise unable to present his case” has been construed as implying that a court may refuse to enforce the award on public policy grounds whenever it makes a finding of other procedural irregularities that would affect justice between the parties.

Secondly, Article V (1)(b) grounds could be raised by only one of the parties, whereas the public policy ground can be raised by the court of enforcement on its own motion. Therefore,



if the court executing the award finds a procedural irregularity that violates national procedural public policy, then it may refuse enforcement on its own motion.

Finally, Article V (1)(b) does not identify under which law a court can determine whether a party has been given proper notice and whether or not he has been able to present his case. The absence of a clear reference to the applicable law might provide the court of enforcement with a legitimate reason to apply its national mandatory rules under Article V (2)(b) of the Convention.

The study argues that examining the validity of a foreign arbitral award according to its conformity with the national procedural public policy rules of the country of enforcement might lead to inappropriate results, particularly that a foreign arbitral award may have been correctly produced under a foreign law that has a close connection to the arbitral process. This may create a conflict of public policy rules between the procedural mandatory rules of the country of enforcement and the arbitral procedural rules that have a connection to the dispute.<sup>2</sup> An execution court is therefore, required to construe the Convention's public policy defence narrowly by confining the application on these grounds to the minimum standards of justice as known in the practice of international commercial arbitration. Accordingly, an arbitral award that is correctly produced under a foreign law must not be refused unless the resulting award leads to a serious violation of justice and equity between the parties. An execution court should also consider that the national mandatory rules of its law might include formal requirements, the violation of which may not necessarily lead to a denial of justice to the parties. Therefore, not every procedural irregularity constitutes a sufficient reason to refuse enforcement of foreign arbitral awards. Moreover, a court should give more

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<sup>2</sup> For example, the law or rules which the parties choose to govern the arbitral procedures and the law of the country in which the arbitral procedures take place.

attention to its ultimate duty which is confined to considerations of justice between the parties and not to the enforcement of formal requirements imposed by its national procedural law.

The examples that have been examined in chapter five reveal that the judicial practice of various legal systems distinguishes between national and international public policy rules. The latter mainly relate to the existence of mutual principles of justice common to the majority of countries, which represent the most fundamental notions of equity and justice. Therefore, international procedural public policy rules could be recognised as those principles of justice that are shared among the international community and should be respected no matter where the arbitration procedures take place. Consequently, this may lead to narrow the domain of formal conditions that are imposed by national mandatory procedural rules that may not be suitable for the requirements of international commercial arbitration.

Finally, the evidence which supports the argument that the notion of international public policy is increasingly recognised as a basis for interpreting Article V (2)(b) of the New York Convention has also been considered in issues that relate to the subject matter of the dispute.<sup>3</sup>

The conclusion that could be drawn from this study could be summed up as follows. The growing acceptance of arbitration by the international commercial community has made it difficult for states to adopt or retain a negative approach to arbitration. A state that wants to participate in international trade should recognise the role of international commercial arbitration and should allow the enforcement of foreign arbitral awards except where there are the clearest breaches of international public policy. However, one should recognise the difficulty of forming a precise definition of international public policy. The absence of a clear definition should not, nevertheless, lead us to underestimate the importance of this concept. The drive towards trade growth and economic globalisation requires international public

policy to be recognised as a guiding principle in order that judicial interference in foreign arbitral awards is restricted to the minimum. This will rest to a great extent upon the national courts' good conscience in providing new solutions that meet the direction of which the international commercial community is moving. A national court that does not recognise the necessity of transposing its domestic arbitration practice to an international level is "very much like the mother who does more harm than good to her children by locking them up under the pretext of protecting them from the different hidden and apparent risks and evils of the outside world, thus depriving them of the opportunity of acquiring the necessary experience to cope with the difficult problems of real adult life."<sup>4</sup> A national court should thus be aware that its role is not limited to the mechanical application of its national law as it stands, but extends to creative interpretation that recognises the specificity of international commercial arbitration. This will be a gradual step by step progression, and a time may come when a compelling need for change will drive national courts to develop a stringent and straightforward case law that recognises the necessity of transposing their domestic arbitration practice to an international level. In order to achieve that, it will be important to train qualified and skilled judges who can distinguish international arbitral awards from purely national arbitral awards. All that can be expected of them is to recognise that the development of international trade brings increasingly complex issues that may not accord with traditional methods, procedures and ways of thinking. Therefore, they must consider that the evolution of international commercial relations requires the application of international public policy rules that are more suitable to international commercial disputes.

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<sup>3</sup> Various examples have been examined in chapter six to illustrate how public policy could be interpreted to include morality, political and economic issues.

<sup>4</sup> See Mohamed Abdel-Khalek Omar, "Reasoning in Islamic Law," *Arab Law Quarterly* [1998] p. 23 at 60.

By way of final conclusion, I can do no better than to quote the comment of van den Berg who states that:<sup>5</sup>

“The interpretation of public policy is like the movement of a pendulum. It has moved from an earlier parochialism to the present attitude in favour of international commercial arbitration. It may reach a point where international commercial arbitration may be favoured too much by an overly narrow interpretation of public policy, and this may produce a counter reaction. But the pendulum has by no means reached that point. At present the judicial attitude in favour of intentional commercial arbitration is just emerging in various countries. This movement should be encouraged, to which end the distinction between domestic and international public policy is a useful criterion.”

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<sup>5</sup> Van den Berg, *op. cit.*, p. 368.

## ANNEXES

### ANNEX A

#### NEW YORK CONVENTION

#### CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS \*

##### Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

##### Article II

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

##### Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid

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\* The New York Convention of 1958, United Nations Treaty Series (1959) Vol. 330, p. 38, No. 4739.

down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies that are imposed on the recognition or enforcement of domestic arbitral awards.

#### **Article IV**

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### **Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.



## **Article VI**

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

## **Article VII**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

## **Article VIII**

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

## **Article IX**

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## **Article X**

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

## **Article XI**

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

## **Article XII**

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

## **Article XIII**

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

## **Article XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

## **Article XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

#### **Article XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958.

## ANNEX B

### LAW NO. 27 FOR 1994 PROMULGATING THE LAW CONCERNING ARBITRATION IN CIVIL AND COMMERCIAL MATTERS \*

In the Name of People,  
The president of the Republic,  
The People's Assembly has adopted the following law and we have promulgated it.

#### Article 1

The provisions of the annexed Law shall apply to any arbitration pending at the time of its entry into force or which commences thereafter, even if it is based on an arbitral agreement concluded before the entry into force of this Law.

#### Article 2

The Minister of Justice shall issue the Decrees required for the execution of this Law, and shall establish the lists of arbitrators from which selections may be made pursuant to the provisions of Article 17 thereof.

#### Article 3

Articles 501 to 513 of Law No. 13/1968 promulgating the Code of Civil and Commercial Procedures are hereby repealed, as well as any provision contrary to the provisions of this Law.

#### Article 4

This Law shall be stamped in the Official Gazette and shall enter into force one month from the day following the date of its publication.

This Law shall be stamped with the Seal of State and enforced as one of its Laws.

Issued at the presidency on 18 April 1994.

Hosni mubarak  
President of the Republic

Law Concerning Arbitration in Civil and Commercial Matters

#### PART 1. GENERAL PROVISIONS

#### Article 1

Subject to the provisions of international conventions applicable in the Arab Republic of Egypt, the provisions of this Law shall apply to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an

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\* The Egyptian Law No 27 of 1994, published in the Egyptian Official Gazette No. 16, 21 April 1994 and became effective on the 22<sup>nd</sup> of May 1994. See, *Intl. Handbook on Comm. Arb. Suppl.* 19. August 1995, Egypt, Annex B, p. 14. Translated from the Arabic official Text under the auspices of the "Association for Arab and African Arbitrators", Cairo, revised under the supervision of Prof. Ahmed S. Al-Kosheri; Ahmed S. El-Kosheri, "EGYPT," *op. cit.*, p. 52 (AnnexI).

arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law.

## **Article 2**

An arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises, for example, the supply of goods or services, commercial agencies, construction and engineering or technical know-how contracts, the granting of industrial, touristic and other licenses, transfer of technology, investment and development contracts, banking, insurance and transport operations, and operations relating to the exploration and extraction of natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamation of agricultural land, protection of the environment and establishment of nuclear reactors.

## **Article 3**

Within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases:

*First:* if the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement. If either party to the arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon.

*Second:* If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad.

*Third:* If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country.

*Fourth:* If the principal places of business of the two parties to the arbitration are situated in the same State at the time of the conclusion of the arbitration agreement, but one of the following places is located outside said State:

- a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it;
- b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed;
- c) the place with which the subject matter of the dispute is most closely connected.

## **Article 4**

1. For the purpose of this Law, the term "arbitration" means voluntary arbitration agreed upon by the two parties to the dispute according to their own free will, whether or not the chosen body to which the arbitral mission is entrusted by agreement of the two parties is a permanent arbitral organization or centre.

2. The term "arbitral panel" denotes the panel composed of one or more arbitrators for the purpose of adjudicating the dispute referred to arbitration. As to the term "court", it means the court belonging to the judicial system of the State.

3. The expression "the two parties to the arbitration" when used in this Law shall denote the parties to the arbitration, whatever their number may be.

## **Article 5**

In the cases where this Law permits the two parties to the arbitration to select the procedures which must be followed in a given matter, this also includes their right to allow third parties to make such selection. In this respect, any arbitration organization or centre in the Arab Republic of Egypt or abroad shall be deemed a third party.

## **Article 6**

Whenever the parties to the arbitration agree to subject the legal relationship between them to the provisions of a standard contract, or international convention or any other document, then the

provisions of such document must apply, including the provisions related to arbitration provided for therein.

#### **Article 7**

1. Unless otherwise provided in a special agreement between the two parties to the arbitration, any letter or written communication shall be delivered to the addressee personally or at his place of business, his habitual residence or mailing address, known to both parties, defined in the arbitration agreement or in the document which contains the relationship subject to the arbitration.
2. If none of these addresses can be identified after having made a reasonable inquiry, communication to the addressee is deemed to have been received if it is sent in the form of a registered letter to the addressee's last known place of business, habitual residence or mailing address.
3. The provisions of this article shall not apply to communications concerning judicial procedures before the courts.

#### **Article 8**

If either party to a dispute knows that any requirement under the arbitration agreement has been violated or a non-mandatory provision of this Law has not been complied with, yet proceeds with the arbitration without stating his objection to the violation or non compliance within the period agreed upon, or without undue delay in the absence of such agreement, the party shall be deemed to have waived his right to object.

#### **Article 9**

1. Competence to review the arbitral matters referred to by this Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt.
2. The court having competence in accordance with the preceding paragraph shall continue to exercise exclusive jurisdiction until completion of all arbitration procedures.

### **PART II. THE ARBITRATION AGREEMENT**

#### **Article 10**

1. The arbitration agreement is an agreement by which the two parties agree to submit to arbitration in order to resolve all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not.
2. The arbitration agreement may be concluded before the dispute has arisen either in the form of a separate agreement or as a clause in a given contract concerning all or certain disputes which may arise between the two parties. In the latter case, the subject matter of the dispute must be determined in the Request for Arbitration referred to in paragraph 1 of Article 30 hereof. The arbitration agreement may also be concluded after the dispute has arisen, even if an action has already been brought before a judicial court, and in such case, the agreement must indicate the issues subject to arbitration, on penalty of nullity.
3. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such reference is such as to make that clause an integral part of the contract.

#### **Article 11**

Arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights. Arbitration is not permitted in matters which can not be subject to compromise.

#### **Article 12**

The arbitration agreement must be in writing, on penalty of nullity. An agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication.



### **Article 13**

1. The court before which an action is brought concerning a disputed matter which is the subject of an arbitration agreement shall hold this action inadmissible provided that the respondent raises this objection before submitting any demand or defence on the substance of the dispute.
2. The fact that the judicial action referred to in the preceding paragraph is brought shall not prevent the arbitral proceedings from being commenced or continued, or the making of the arbitral award.

### **Article 14**

Upon request of either party to the arbitration, the court referred to in Article 9 may order the making of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings.

## **PART III. THE ARBITRAL PENAL**

### **Article 15**

1. The arbitral panel consists, by agreement between the parties, of one or more arbitrators. In the absence of such agreement on the number of arbitrators, the number shall be three.
2. If there is more than one arbitrator, the panel must consist of an odd number, on penalty of nullity of the arbitration.

### **Article 16**

1. The arbitrator cannot be a minor, under guardianship, have been deprived of his civil rights by reason of a judgment against him for a felony or misdemeanour contrary to honesty or due to a declaration of his bankruptcy; unless he has been restored to his status.
2. The arbitrator is not required to be of a given gender or nationality, unless otherwise agreed upon between the two parties or provided for by law.
3. The arbitrator's acceptance of his mission shall be in writing. When accepting, he must disclose any circumstances which are likely to cast doubts on his independence or impartiality.

### **Article 17**

1. The two parties to the arbitration may agree on the choice of the arbitrators, and on the method and period of time for effecting their choice. In the absence of such agreement, the following steps shall be followed:
  - a) If the arbitral panel consists of a sole arbitrator, the court specified in Article 9 of this Law shall undertake the appointment of the arbitrator upon request of either party.
  - b) If the arbitral panel consist of three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall then appoint the third. If either party fails to appoint his arbitrator within thirty days of a request to do so from the other party, or if the two appointed arbitrators fail to agree on the third arbitrator within thirty days of the date of the latest appointment between the two, the court specified in Article 9 of this Law shall undertake the appointment upon request of either party. The arbitrator chosen by the two arbitrators or appointed by the court shall chair the arbitral panel. The above provisions shall apply if the arbitral panel consists of more than three arbitrators.
2. If either party violates the agreed procedures for the choice of arbitrators, or if the two appointed arbitrators are unable to reach an agreement expected of them under the agreed procedure, or if a third party fails to perform any function entrusted to him in this regard, then the court specified in Article 9 of this Law shall carry out the required procedure or the function needed upon the request of either party, unless the agreement provides other means for securing the appointment.
3. In the choice of the arbitrator, the court shall observe the conditions required by this Law and those agreed upon by the parties, and shall render its decision on said choice expeditiously. Subject to the provisions of Articles 18 and 19 of this Law, such decision shall be subject to no appeal.

### **Article 18**

1. An arbitrator may be challenged only if circumstances exist that give rise to serious doubts on his impartiality, or independence.

2. A party to the arbitration may challenge the arbitrator appointed by it or in whose appointment it has participated, only for reasons of which he becomes aware after the appointment has been made.

#### **Article 19**

1. The challenge request shall be submitted in writing to the arbitral panel, indicating the reasons for the challenge, within fifteen days after the challenging party became aware of the constitution of the arbitral panel or of the circumstances which justify the challenge. Unless the challenged arbitrator withdraws from his office, the arbitral panel shall decide on the challenge.
2. A challenge request shall not be accepted from a party who had previously submitted a request challenging the same arbitrator in the same arbitration.
3. The challenging party may lodge a recourse against the decision refusing his request, within thirty days of receiving notice thereof, before the court specified in article 9 of this Law, and the court's decision shall be subject to no appeal.
4. Neither the submission of the challenge nor the recourse against the decision of the arbitral panel rejecting such request shall entail the suspension of the arbitral proceedings. However, if the challenge of the arbitrator is successful, whether by a decision of the arbitral panel or by the court reviewing the challenge, the arbitral proceeding already conducted, including the arbitral award, shall be null and void.

#### **Article 20**

If the arbitrator is unable to perform his mission, fails to perform his task or interrupts the performance thereof in a manner which causes undue delay in the arbitral proceedings, and if he does not withdraw and the parties have not agreed to terminate his mandate, then the court specified in Article 9 of this Law may order the termination of his mandate upon request of either party.

#### **Article 21**

If the arbitrator's mandate is terminated through challenge, revocation, withdrawal or for any reason, a substitute arbitrator shall be appointed to replace him according to the rules applicable to the appointment of the arbitrator being replaced.

#### **Article 22**

1. The arbitral tribunal is competent to rule on the objections related to its lack of jurisdiction, including objections claiming the non-existence of an arbitration agreement, its extinction, nullity of said agreement, or that it does not cover the subject matter in dispute.
2. Those pleas shall be raised at a date not later than that of submitting the respondent's statement of defence referred to in paragraph 2 of Article 30 of this Law. The appointment or participation in the appointment of an arbitrator by one of the two parties to the arbitration shall not preclude such party from raising such a plea. A plea that the arbitration agreement does not cover the disputed issues, must be raised immediately, otherwise the right to raise it shall be precluded. In all cases, the arbitral panel may admit a later plea if it considers the delay justified.
3. The arbitral panel may rule on the pleas referred to in paragraph 1 of this Article either as a preliminary question before ruling on the merits or adjoin them to the merits in order to be ruled upon together. If the arbitral panel rules to dismiss a plea such motion may not be raised except through the institution of a recourse for the annulment of the arbitral award disposing of the whole dispute pursuant to Article 53 of this Law.

#### **Article 23**

The arbitration clause shall be treated as an independent agreement separate from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause, provided that such clause is valid per se.

#### **Article 24**

1. Both parties to the arbitration may agree to confer upon the arbitral panel the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the

subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the measure ordered.

2. If the party against whom the order was issued fails to execute it, the arbitral panel, upon the request of the other party, may authorize the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the court specified in Article 9 of this Law for rendering an execution order.

#### **PART IV CONDUCT OF THE ARBITRAL PROCEEDINGS**

##### **Article 25**

The two parties to the arbitration are free to agree on the procedure to be followed by the arbitral panel, including the right to submit the arbitral proceedings to the rules prevailing under the auspices of any arbitral organization or centre in the Arab Republic of Egypt or abroad. In the absence of such agreement, the arbitral panel may, subject to the provisions of this Law, adopt the arbitration procedures it considers appropriate.

##### **Article 26**

The two parties to arbitration shall be treated with equality, and each shall be given an equal and full opportunity of presenting its case.

##### **Article 27**

The arbitral proceedings commence on the date on which the respondent receives the request for arbitration from the claimant, unless the two parties agree on another date.

##### **Article 28**

The two parties to the arbitration are free to agree on the place of arbitration in Egypt or abroad. Failing such agreement, the arbitral panel shall determine the place of arbitration having regard to the circumstances of the case including the convenience of the place to the parties. This shall be without prejudice to the power of the arbitral panel to meet in any place it considers appropriate to undertake any of the arbitral proceedings, such as hearing the parties to the dispute, witnesses and experts, reviewing documents, inspecting goods or other property, for consultation among its members or for any other reason.

##### **Article 29**

1. The arbitration shall be conducted in Arabic, unless another language or languages are agreed upon by the parties or determined by the arbitral panel. This agreement or determination shall apply to all written statements and briefs, to the oral hearings as well as to all awards, decisions or other communications by the arbitral panel, unless specified otherwise by the agreement of the two parties or by determination of the arbitral panel.
2. The arbitral panel may order that all or part of the documentary evidence submitted in the case shall be accompanied by a translation into the language or languages used in the arbitration. In the case of multiplicity of such languages, the arbitral panel may limit the translation to some languages to the exclusion of others.

##### **Article 30**

1. Within the period of time agreed by the two parties or determined by the arbitral panel, the claimant shall send to the respondent and to each of the arbitrators a written statement of its case that includes its name, address, the respondent's name and address, an explanation of the facts of the case, the determination of the points at issue in the dispute, the relief or remedy sought as well as all other elements which are required to be mentioned in such statement by agreement between the two parties.
2. Within the period of time agreed by the two parties or determined by the arbitral panel, the respondent shall send to the claimant and to each of the arbitrators a written Statement of Defence in reply to the Statement of the claimant's case. He may include in such Statement any incidental claims related to the subject matter of the dispute or may invoke a right arising thereunder in view of raising a plea for set-off. He may do so even in a later stage of the proceedings, if the arbitral panel deems that the circumstances justify the delay.

3. Both the claimant and the respondent are free to enclose with the Statement of Claim or with the Statement of Defence, as the case may be, copies of the documents supporting the position of the concerned party, and may add a reference to all or some of the documents and evidence it intends to submit. This does not prejudice the right of the arbitral panel, at any stage of the proceedings, to request the submission of the originals of the documents or materials invoked by either party to support its case.

#### **Article 31**

All briefs, statements, documents or other information submitted to the arbitral panel by one party shall be communicated to the other party. Similarly, copies of whatever may be submitted to the arbitral panel such as expert reports, evidentiary documents or other elements of proof shall be communicated to the parties.

#### **Article 32**

Either party may amend or supplement its submissions or supporting arguments during the course of the arbitral proceedings unless the arbitral panel considers it inappropriate having regard to avoiding delay in adjudicating the case.

#### **Article 33**

1. The arbitral panel may hold oral hearings in order to enable each party to explain the merits of the case and to present its arguments as well as evidence. It may also decide that the proceedings shall be conducted exclusively on the basis of the submitted briefs and written documents, subject to any contrary agreement by the parties.
2. The two parties to the arbitration must be notified of the dates fixed for the hearings or the meetings which the arbitral panel decides to hold, sufficiently in advance if the scheduled date as determined by the panel according to circumstances.
3. Summary minutes of each meeting held by the arbitral panel shall be recorded in "*proces-verbal*", and a copy thereof shall be delivered to each of the two parties, unless otherwise agreed by the parties.
4. The hearing of witnesses and experts shall be conducted without taking an oath.

#### **Article 34**

If without showing sufficient cause, the claimant fails to submit the written Statement of claim pursuant to paragraph 1 of article 30 of this Law, the arbitral panel shall terminate the arbitral proceedings, unless otherwise agreed by the parties.

If the respondent fails to submit its Statement of Defence pursuant to paragraph 2 of article 30 of this Law, the arbitral panel shall continue the arbitral proceedings without treating such failure as an admission by the respondent of the claimant's allegations, unless otherwise agreed by the parties.

#### **Article 35**

If either party fails to appear at any of the meetings or to submit the documents required from it, the arbitral panel may continue the arbitral proceedings and make the award on the dispute based upon the elements of evidence before it.

#### **Article 36**

1. The arbitral panel may appoint one or more experts to submit on specific issues determined by the arbitral panel a written report or an oral report to be included in the *proces-verbal* of the meeting. A copy of the terms of reference regarding the mission entrusted to the expert shall be sent to each party.
2. Each party shall provide the expert with all relevant information concerning the dispute or produce or provide access to relevant documents, goods or other property for his inspection. The arbitral panel shall decide on any controversy arising in this respect between the expert and one of the parties.
3. The arbitral panel shall send to each party a copy of the expert's report immediately after its submission, granting each party the opportunity to express its opinion thereon. Each of the two parties is entitled to review and examine the documents upon which the expert relied in his report.



4. The arbitral panel may decide, after the submission of the expert's report, whether on its own initiative or upon request of a party to the arbitration, to hold a meeting to hear the expert and to provide for both parties the opportunity to hear him and to put questions to him about what is contained in his report. Each of the parties may present one or more expert witnesses in order to give testimony on the issues raised in the report of the expert appointed by the arbitral panel, unless otherwise agreed by the parties to the arbitration.

#### **Article 37**

The president of the court referred to in Article 9 of this Law is competent, upon the request of the arbitral panel, to do the following:

- a) Condemn any of the witnesses who refrains from attending or declines to reply, by inflicting the sanction prescribed in Articles 78 and 80 of the Law of Evidence in Civil and Commercial Matters.
- b) Order a rogatory commission.

#### **Article 38**

The proceedings before the arbitral panel shall be suspended upon occurrence of any of the grounds for suspension and according to the conditions related thereto as provided for in the Code of Civil and Commercial Procedures. The effects of the suspension shall be those prescribed in the said Code.

### **PART V. THE ARBITRAL AWARD AND THE CLOSING OF THE PROCEDURES**

#### **Article 39**

1. The arbitral panel shall apply to the substance of the dispute the rules chosen by the two parties. If they agree on the applicability of the law of a given State, only the substantive rules thereof shall be applicable and not its conflict of laws rules, unless otherwise agreed by the parties.
2. If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral panel shall apply the substantive rules of the law it considers most closely connected to the dispute.
3. the arbitral panel, when adjudicating the merits of the dispute, shall decide in accordance with the terms of the contract in dispute and the usages of the trade applicable to the transaction.
4. The arbitral panel may, if it has been expressly authorized to act as an "amiable compositeur" by agreement between the two parties to the arbitration, adjudicate the merits of the dispute in conformity with the rules of justice and fairness (*ex aequo et bono*), without being restricted by the legal provisions.

#### **Article 40**

The award of an arbitral panel consisting of more than one arbitrator shall be made by the majority after deliberations conducted in the manner determined by the arbitral panel, unless otherwise agreed by the parties.

#### **Article 41**

If during the arbitral proceedings, the two parties agree on a settlement that terminates the dispute, they may request that the terms of the settlement be recorded by the arbitral panel in the form of an arbitral award on agreed terms which terminate the proceedings. Such award shall have the same effect with regard to enforcement as all other arbitral awards.

#### **Article 42**

The arbitral panel may make interim or partial awards before making its final award which terminates the entire dispute.

#### **Article 43**

1. The arbitral award shall be made in writing and shall be signed by the arbitrators. If the arbitral panel consists of more than one arbitrator, the signatures of the majority of the arbitrators shall suffice, provided that the award states the reasons for which the minority did not sign.

2. The arbitral award shall state the reasons upon which it is based, unless the two parties to arbitration have agreed otherwise or the law applicable to the arbitral proceedings does not require the award to be supported by reasons.
3. The arbitral award shall include the names and addresses of the parties, the names, addresses, nationalities and capacities of the arbitrators, a copy of the arbitration agreement, a summary of the parties' requests, submissions, documents, the dispositive part of the award, date and place of making, as well as the reasons whenever their inclusion is required.

#### **Article 44**

1. The arbitral panel shall deliver to each of the two parties a copy of the arbitral award signed by the arbitrators who approved it within thirty days of the date of its making.
2. No publication of the award or parts thereof shall be authorized except with the approval of both parties to the arbitration.

#### **Article 45**

1. The arbitral panel shall make the award terminating the dispute within the period agreed upon by the two parties. In the absence of such agreement the award must be made within twelve months of the date of commencement of the arbitral proceedings. In all cases, the arbitral panel may decide to extend the period of time, provided that the period of extension shall not exceed six months, unless the two parties agree on a longer period.
2. If the arbitral award is not rendered within the period referred to in the preceding paragraph, either of the two parties to arbitration may request the president of the court referred to in Article 9 of this Law to issue an order either extending the period of time or terminating the arbitral proceedings. In the latter case, either party may bring the dispute to the court having initial jurisdiction to adjudicate the case.

#### **Article 46**

If, in the course of the arbitral proceedings, a matter falling outside the scope of the arbitral panel's jurisdiction is raised, or if a document submitted to it is challenged for forgery, or if criminal proceedings are undertaken regarding the alleged forgery or for any other criminal act, the arbitral panel may decide to proceed with the subject matter of the dispute without any reliance on the incidental matter raised or on the document alleged to be a forgery or on the other criminal act. Otherwise, the arbitral panel shall suspend the proceedings until a final judgment is rendered in this respect. Such measure shall entail suspension of the period for making of the arbitral award.

#### **Article 47**

The party in whose favour the arbitral award has been made shall deposit, at the Secretariat of the court referred to in Article 9 of this Law, the original award or a copy thereof in the language in which it was rendered, or an Arabic translation thereof authenticated by a competent organism if it was rendered in a foreign language. The court's secretary shall evidence such deposit in a *proces-verbal*, and each of the two parties to arbitration may request a copy of the said *proces-verbal*.

#### **Article 48**

1. The arbitral proceedings are terminated either by the making of the award ending the dispute or by a court decision ordering the termination of the arbitral proceedings pursuant to paragraph 2 of Article 45 of this Law. The arbitral proceedings can also be terminated by a decision of the arbitral panel in the following cases:
  - a) If the two parties agree on the termination of the proceedings.
  - b) If the claimant withdraws its claim, unless the arbitral panel decides, upon request of the respondent that the latter has a legitimate interest in continuing the arbitral proceedings until the dispute is settled by a final award.
  - c) If for any other reason the arbitral panel finds that the continuation of the proceedings has become unnecessary or impossible.
3. Subject to the provisions of Articles 49, 50 and 51 of this Law, the mandate of the arbitral panel ends with the termination of the arbitral proceedings.



#### **Article 49**

1. Either party to the arbitration may request the arbitral panel, within thirty days of receipt of the arbitral award, to give an interpretation clarifying an ambiguity that appears in the dispositive part of the award. The party requesting clarification must notify the other party of the request before presenting it to the arbitral panel.
2. The interpretation decision shall be made in writing within thirty days of receipt of the request for clarification by the arbitral panel. The panel may extend that period by another thirty days if it considers such extension necessary.
3. The interpretation decision made by the arbitral panel shall form an integral part complementing the arbitral award which it clarifies and shall be provided the same treatment.

#### **Article 50**

1. The arbitral panel shall correct any exclusively material errors in its award, whether typographical or in computation. Such corrections shall be undertaken by the arbitral panel on its own initiative or upon request from either party. The arbitral panel shall make the correction without holding any hearing within thirty days following the making of the award or the receipt of the request for correction as the case may be, and it may extend this period by another thirty days if it considers this to be necessary.
2. The correction decision shall be made in writing by the arbitral panel and notified to the two parties within thirty days of the date of its making. If the arbitral panel abuses its powers of correction, its decision may be subject to recourse by means of an action for annulment in conformity with the provisions of Articles 53 and 54 of this Law.

#### **Article 51**

1. Either party to the arbitration may, even after the expiration of the arbitration period, request the arbitral panel within the thirty days following the receipt of the arbitral award, to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. Such request must be notified to the other party before submission to the arbitral panel.
2. The arbitral panel shall make its decision within sixty days of submission of the request, and it may extend this period for a further thirty days if it considers this to be necessary.

### **PART VI ANNULMENT OF THE ARBITRAL AWARD**

#### **Article 52**

1. Arbitral awards rendered in accordance with the provisions of this Law may not be challenged by any of the means of recourse provided for in the Code of Civil and commercial Procedures.
2. An action for the annulment of the arbitral award may be instituted in accordance with the provisions of the following two articles.

#### **Article 53**

1. An arbitral award may be annulled only:
  - a) If there is no arbitration agreement, if it was void, voidable or its duration had elapsed;
  - b) If either party to the arbitration agreement was at the time of the conclusion of the arbitration agreement fully or partially incapacitated according to the law governing its legal capacity;
  - c) If either party to the arbitration was unable to present its case as a result of not being given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or for any other reason beyond its control;
  - d) If the arbitral award failed to apply the law agreed upon by the parties to govern the subject matter in dispute;
  - e) If the composition of the arbitral panel or the appointment of the arbitrators was in conflict with this Law or the parties' agreement;
  - f) If the arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement. However, in the case when matters falling within the scope of the arbitration can be separated from the part of the award which contains matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only;

- g) If the arbitral award itself or the arbitration procedures affecting the award contain a legal violation that causes nullity.
2. The court adjudicating the action for annulment, shall *ipso jure* annul the arbitral award if it is in conflict with the public policy in the Arab Republic of Egypt.

#### **Article 54**

1. The action for annulment of the arbitral award must be brought within ninety days of the date of the notification of the arbitral award to the party against whom it was made. The admissibility of the action for annulment shall not be prevented by the applicant's renouncement of its right to request the annulment of the award prior to the making of the arbitral award.
2. Jurisdiction with regard to an action for the annulment of awards made in international commercial arbitrations lies with the court referred to in Article 9 of this Law. In cases not related to international commercial arbitration, jurisdiction lies with the court of appeal having competence over the tribunal that would have initially had jurisdiction to adjudicate the dispute.

### **PART VII. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS**

#### **Article 55**

Arbitral awards rendered in accordance with the provisions of the present Law have the authority of the *res Judicata* and shall be enforceable in conformity with the provisions of this Law.

#### **Article 56**

Jurisdiction to issue an enforcement order of arbitral awards lies with the president of the court referred to in Article 9 of this Law or with the member of said court who has been mandated for this purpose by delegation from said president. The application for enforcement of the arbitral award shall be accompanied by the following:

1. The original award or a signed copy thereof.
2. A copy of the arbitration agreement.
3. An Arabic translation of the award, certified by a competent organism, in case the award was not made in Arabic.
4. A copy of the *proces-verbal* assisting the deposit of the award pursuant to Article 47 of this law.

#### **Article 57**

The filing of an action for annulment does not suspend the enforcement of the arbitral award. Nevertheless, the court may order said suspension if the applicant requests it in his application and such request is based upon serious grounds. The court shall rule on the request for suspension of the enforcement within sixty days of the date of the first hearing fixed in relation thereto. If suspension is ordered, the court may require the provision of a given security or monetary guarantee. When the court orders a suspension of enforcement, it must rule on the action for annulment within six months of the date when the suspension order was rendered.

#### **Article 58**

1. Application for the enforcement of an arbitral award shall not be admissible before the expiration of the period during which the action for annulment should be filed in the court registry.
2. The application to obtain leave for enforcement of the arbitral award according to this law shall not be granted except after having ascertained the following:
  - a) That it does not contradict a judgment previously rendered by the Egyptian Courts on the subject matter in dispute;
  - b) That does not violate the public policy in the Arab Republic of Egypt; and
  - c) That it was properly notified to the party against whom it was rendered.
3. The order granting leave for enforcement is not subject to appeal. However, the order refusing to grant enforcement may be subject to a petition lodged, within thirty days refusing to grant thereof, before the competent court referred to in Article 9 of this Law.

## ANNEX C

Law No. 9 of the year 1997 Amending Certain Provisions of Arbitration Law in Civil and Commercial Matters as Promulgated by Law No. 27 of the Year 1994 \*

In the name of the people;  
The President of the Republic;  
The People's Assembly passed the following law and it is promulgated by us:

### **Article (1)**

A second clause shall be added to Article (1) of the Law on Arbitration in Civil and Commercial Matters, as promulgated by the Law No. 27 of the year 1994, reading as follows:

“With regard to administrative contracts litigations, agreement on arbitration shall be reached with the approval of the concerned minister of the official assuming his power with respect to public juridical persons. No delegation of powers shall be authorised therefore.”

### **Article (2)**

This law shall be published in the Official Journal and shall come into force effective the day following the date of its publication.

The present law shall be stamped with the SEAL of the State and shall be enforced as one of its laws.

Issued at the Presidency of the Republic on 6 Al-Moharram, Hejri 1418 Corresponding to 13 May, 1997).

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\* 1 *Journal of Arab Arbitration*, (1999), p. 40.

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